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Supreme Court of the United States

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

—v.—

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent,

—and—

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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93 pp

QUESTIONS PRESENTED

1. Under the Fifth and Fourteenth Amendments to the U.S. Constitution, can a default judgment be entered against a defendant as a sanction for its incomplete answers to interrogatories where the answers in question, as well as the defendant's conduct throughout more than two years of discovery, cannot support a presumption that defendant had no defense to the lawsuit?

2. In reviewing a default judgment entered against a party as a sanction for discovery abuse, is it sufficient for the appellate court to determine the propriety of the trial court's finding of "willfulness" and "bad faith", as suggested by this Court's opinion in *National Hockey League* (the rule in the First, Third, Fourth, Seventh, Eighth, Tenth, Eleventh and D.C. Circuits), or must the appellate court also determine whether the party's conduct gives rise to the evidentiary presumption required by this Court's opinion in *Hammond Packing* (the rule in the Fifth and Ninth Circuits)?

LIST OF PARTIES

Petitioner Ethicon, Inc. is a wholly-owned subsidiary of Johnson & Johnson.

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MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Ethicon, Inc. requests that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Montana entered in this proceeding on March 24, 1994.

OPINIONS BELOW

The decision of the Montana Supreme Court denying Ethicon's appeal from the Montana District Court is reported at 51 Mont. St. Rep. 296 and 1994 Mont. LEXIS 75, and is printed in Appendix A hereto. The trial court's decision granting a default judgment against Ethicon is unreported and is printed in Appendix B. The trial court's decision denying

Ethicon's motion for reargument of the default judgment is also unreported and is printed in Appendix C.

JURISDICTION

The opinion of the Montana Supreme Court was entered on March 24, 1994. Ethicon's Petition for Rehearing was denied on April 14, 1994, and final judgment was entered in the Montana Supreme Court on April 19, 1994. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment XIV:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This case presents the question of whether a defendant in a civil lawsuit may be sanctioned for incomplete discovery responses by the entry of a default judgment where neither the discovery responses in question nor the party's conduct throughout the litigation can support a presumption that the party has no defense to the complaint. Until fairly recently, this Court's landmark decisions in *Hovey* v. *Elliott*, 167 U.S. 409 (1897), and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), had governed the entry of default judgments. Those cases hold that a party may not be stripped of its right to prosecute or defend a lawsuit due to its failure to adequately respond to discovery requests unless that failure supports such a presumption.

Now, however, a split has developed among the Circuits as to whether this doctrine still applies. As a result of this Court's *per curiam* opinion in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), many Circuits, as well as some state courts, have been upholding default judgments based solely upon a finding that the defaulted party's conduct was "willful" and in "bad faith". While the facts in most of those cases would have satisfied the *Hammond Packing* presumption, the lack of any discussion of that presumption in these cases has created considerable uncertainty as to whether this due process requirement continues to exist. That uncertainty led the Montana Supreme Court to uphold a default judgment in this case based solely on an after-the-fact finding that Ethicon—which participated in two years of wide-ranging and intensive discovery—had filed evasive interrogatory answers regarding the negligence of its co-defendant.

There is no question that discovery abuse is a serious problem and should not be condoned. But, in their haste to punish litigants for discovery abuse, some courts are ignoring the due process rights of parties accused of such abuse. Unless this Court steps in and reaffirms the survival of the presumption required by *Hammond Packing*, more and more courts are going to do what the Montana courts did to Ethicon in this case: permit the entry of a default judgment (with multi-million-dollar damages consequences) against a defendant based *solely* on a finding that the defendant's answers to three or four interrogatories were evasive. Because this Court's decision in *National Hockey League* has been read to permit this result, only a clarification from this Court can guarantee that due process will also be taken into account in such cases.

The Factual Background

In October 1985, plaintiff Helen Eisenmenger underwent an operation to remove plaque that had built up in her left carotid artery. The surgery was performed by Dr. James

Mungas at Montana Deaconess Medical Center ("MDMC"). Dr. Mungas closed the incision using a suture manufactured by Ethicon. Dr. Mungas secured the suture by sewing from one end of the opening to the other, a procedure which is not recommended by Ethicon.

Two days later, at approximately 7:30 p.m., plaintiff experienced bleeding and swelling at the site of her incision. Dr. Mungas performed a re-operative procedure, during which he observed a partial opening of the incision; Dr. Mungas removed a portion of the original suture, replaced it with a second Ethicon suture, and tied the second suture to the remaining portion of the original suture. This operation was completed by approximately 11:00 p.m. and Mrs. Eisenmenger was returned to intensive care with movement observed in all four limbs.

Inexplicably, Mrs. Eisenmenger was not seen again by a doctor until 8:00 a.m. the following morning. By that time she had suffered a stroke which left her a severely disabled hemiplegic. Thereafter Mrs. Eisenmenger filed this medical malpractice and products liability case against Dr. Mungas, MDMC and Ethicon.

The Procedural History

In November 1991, following $2^1/_2$ years of pleadings, motions and discovery, plaintiff's counsel conceded at a pretrial conference that he had no direct evidence of negligence by Ethicon, Dr. Mungas or MDMC and that, accordingly, the negligence claims against all three defendants would be based solely on *res ipsa loquitur*. This concession was consistent with the testimony of plaintiff's own medical expert, Dr. Paul Collier, who chose not to find any negligence on behalf of Dr. Mungas or MDMC. The court thereupon set a briefing schedule for summary judgment motions. Although plaintiff had yet to take the deposition of Ethicon's expert, her counsel did not seek to do so prior to adjudication of the motions; in fact, it

was agreed during a telephone conference that all further depositions would be postponed until *after* the motions were decided (A 259).[1]

In February 1992, the trial court awarded summary judgment to Dr. Mungas and MDMC on the ground that *res ipsa* could not support a claim of medical malpractice (A 223). As to Ethicon, the court entered summary judgment dismissing plaintiff's strict liability claim but refused to dismiss plaintiff's negligence claim (A 224, 228).

Shortly thereafter, plaintiff moved for reconsideration of the summary judgment decision. She also filed an extraordinary alternative motion against Ethicon. That motion was predicated on the fact that, although plaintiff had still not taken the deposition of Ethicon's expert, she recognized that the expert would testify that conduct by Dr. Mungas and/or MDMC could have caused the disruption of the suture line. As plaintiff stated in that motion (A 237):

> "In reliance upon *Ethicon's* repeated inability to produce any evidence of negligence of Mungas or the hospital (other than the circumstantial evidence afforded by the doctrine of res ipsa), Plaintiff relinquished its other negligence claims against Mungas and the hospital."

The Default Judgment

In March 1992, more than a month after plaintiff had sought to preclude Ethicon's use of the *expected* testimony of its expert, plaintiff took the deposition of that expert, Dr. Cornelius Olcott. Plaintiff used the deposition to elicit evidence to support her recently dismissed malpractice claim against Dr. Mungas. Thus she elicited testimony from Dr. Olcott that, based on Dr. Mungas' description of the technique he used in closing Mrs. Eisenmenger's incision, and taking into account

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[1] Citations designated "A" are to the Appendix that was filed in the Montana Supreme Court.

certain warning letters from Ethicon to surgeons, including Dr. Mungas, regarding that technique (letters which had long ago been produced in discovery), he believed that Dr. Mungas used a substandard technique and that this is why the incision came open (A 244-45 and A 246-47).

Plaintiff thereupon filed a motion for sanctions pursuant to Montana Civil Procedure Rule 37(b), which is identical to Fed. R. Civ. P. 37(b). The gist of the motion was that, by not affirmatively disclosing in its interrogatory answers that Dr. Olcott believed that Dr. Mungas had used an improper suturing technique, Ethicon was guilty of deliberately concealing Dr. Olcott's opinion. Ethicon was said to have done so as part of a deliberate strategy to preclude plaintiff from having "her day in court with all of the defendants present".

The trial court granted the motion. It held that Ethicon had made a "knowing concealment" of Dr. Olcott's testimony, that this concealment caused plaintiff to abandon her negligence claims against Dr. Mungas and MDMC, and that, had the Court known of Dr. Olcott's testimony, it is "very doubtful" that Dr. Mungas' motion for summary judgment would have been granted (A 285). The court concluded that plaintiff had suffered "extreme prejudice" due to Ethicon's "discovery abuses" and that plaintiff was entitled to sanctions. The court therefore struck Ethicon's answer and entered a default judgment against it on the issue of liability (A 286-87).

The "Trial"

The only trial that was held was a trial of plaintiff's damages against Ethicon, the sole remaining defendant. Having been instructed that Ethicon's liability had already been established, the jury returned a verdict in plaintiff's favor in the amount of $2.3 million.

Ironically, during the damages trial the Court expressed concern over the severity of the sanction it had imposed on Ethicon. It conceded that "probably some other sanctions

should have been fashioned" (A 309) and that "[i]n retrospect looking back, I may have used a meat ax to try to impose some kind of sanction" (A 311). The court also made it clear that its anger was focused on the fact that it had not known of Dr. Olcott's opinion regarding Dr. Mungas' suturing technique when it granted summary judgment to Dr. Mungas. As the court stated (*Id.*):

> "I don't think the summary judgment would ever have been granted, letting out the other two Defendants had I known that."

The Decision Below

The Montana Supreme Court held that the trial court did not abuse its discretion in issuing a default judgment against Ethicon due to Ethicon's failure to disclose Dr. Olcott's opinion as to Dr. Mungas' improper suturing technique (15a-16a). The court accused Ethicon of having engaged in "intolerable gamesmanship and obstructiveness" which caused "severe prejudice" to Eisenmenger, *i.e.* the dismissal of her claims against Dr. Mungas (*Id.*). The court rejected Ethicon's due process argument. In doing so, it held that this Court's 1909 decision in *Hammond Packing does not* limit default judgments to those situations where the defendant's failure to provide discovery creates a presumption that it has no evidence to offer in its defense. Thus the court stated (16a):

> "*Hammond* does not establish such a blanket rule. The holding therein that the creation of such a presumption meets the requirements of due process is not equivalent to a holding that the creation of such a presumption is required for purposes of due process."

The Montana court went on to hold (*Id.*) that all that is necessary to support the entry of a default judgment is a finding of "willfulness, bad faith, or fault", citing this Court's opinion in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 212

(1958). The court concluded that this standard was satisfied here (17a):

> "In this case, the sanction of default judgment enforces due process by preventing Ethicon from profiting by its discovery abuse and by assuring due process to the opposing parties whose rights have been prejudiced."

REASONS FOR GRANTING THE PETITION

I

UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION, A COURT MAY NOT STRIP A PARTY OF ITS RIGHT TO DEFEND A LAWSUIT DUE TO IMPROPER DISCOVERY CONDUCT UNLESS THAT CONDUCT SUPPORTS A PRESUMPTION THAT THE PARTY HAS NO EVIDENCE TO OFFER IN ITS DEFENSE

There is no question that a trial court has the authority to sanction a party and/or its counsel for discovery abuse. But where the trial court's sanction is the entry of a default judgment, Constitutional considerations arise. In flatly ignoring those Constitutional implications, and in treating this solely as a matter of punishment for discovery abuse, the Montana courts have ignored 100 years of Supreme Court case law.

A. This Court's Due Process Rulings

In *Hovey* v. *Elliott*, 167 U.S. 409 (1897), this Court held that, notwithstanding a trial court's inherent power to punish a party for contempt, that power does not extend to striking the party's pleading and entering a default judgment against it. Rhetorically, the Court asked (p. 417):

> "Can it be doubted that due process of law signifies a right to be heard in one's defense?"

In holding that the default did indeed amount to a denial of due process, this Court stated (p. 418-19):

> "The decree therefore awarded the property of the defendant to the complainants. . . . If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law."

This decision was modified twelve years later in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909). In that case the defendant, an out-of-state insurance company that was sued by the State of Arkansas for violation of the State's antitrust law, refused to comply with *any* of the State's demands for discovery. As a consequence, its answer was stricken and a default judgment was entered against it. The Court began by reaffirming the Constitutional imperative of *Hovey* v. *Elliott*; it pointed out that the right to due process was equally secure from sanctions imposed under a trial court's inherent powers (as in *Hovey*) or under sanctioning powers bestowed by state law (as in *Hammond*).

The Court went on to hold, however, that *Hovey* did not preclude the entry of a default judgment under the circumstances present in *Hammond* because the company's failure to engage in discovery *justified a presumption that it had no evidence to offer in its defense*. As the Court explained (p. 350-51):

> "Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to

> the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause.
>
> * * *
>
> The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering."

The *Hammond* doctrine has remained intact over the ensuing 85 years. In 1958, and again in 1982, this Court reaffirmed the rule that due process forbids the imposition of a default judgment for non-compliance with discovery demands *unless* the non-compliance supports a presumption that the party has no evidence to offer on its behalf. Thus in *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197 (1958), a Swiss holding company seeking the return of property seized by the Government saw its complaint dismissed by the District Court due to its inability to produce certain bank records. This Court reversed. It pointed out that the District Court's power to impose discovery sanctions under Rule 37 is necessarily limited by the due process clause (p. 209):

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

The Court noted that, since the plaintiff was unable to produce the discovery in question for reasons beyond its control, the presumption required by *Hammond* "might well falter" (p. 210).

In *Insurance Corporation of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), this Court held that the *Hammond Packing* presumption was satisfied and that the sanction in question was therefore appropriate. In that case, a group of foreign insurance companies who contended that they were not subject to personal jurisdiction in the Western District of Pennsylvania, had repeatedly refused to comply with orders directing them to provide discovery of facts relating to personal jurisdiction. As a sanction, the District Court imposed a finding that the insurers were subject to jurisdiction in that District. This Court held that this was a proper application of the *Hovey* and *Hammond* decisions. As Justice White stated (p. 706):

> "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption."

B. This Case Cannot Support A Presumption That Ethicon Had No Defense

When the record of this case is examined, it can readily be seen that there is no basis for a finding that Ethicon's "dis-

covery abuse" gave rise to a presumption that it had no defense to the claims against it.

The startling thing about this case is that it is *not* about a litigant who has refused to participate in discovery or who has refused to provide discovery regarding a particular subject matter. To the contrary, Ethicon was subjected to massive, and punitively expensive, discovery. It was required to respond to over 1,600 discovery requests; it produced tens of thousands of documents; it opened two plants for inspection and videotaping; and it provided eight witnesses for depositions.

Moreover, while Ethicon stands convicted of having made a "concealment" of "material evidence", there was no such concealment. All that happened was that Ethicon's expert looked at the same evidence that was available to plaintiff's expert and concluded that the surgeon's suturing technique caused the suture line to come apart. Plaintiff's expert chose not to draw such a conclusion.

1. The Nature Of Ethicon's "Concealment"

What Ethicon was accused of concealing was the *opinion* of its expert surgeon, Dr. Cornelius Olcott, that the suture may have ruptured because of Dr. Mungas' use of an improper suturing technique. Dr. Olcott's opinion regarding Dr. Mungas' knotting technique was based on several concrete facts that had long been part of the discovery record. They include the following.

Ethicon's "Dear Doctor" Letters: Early in the litigation, Ethicon produced two "Dear Doctor" letters that it had sent to surgeons throughout the country. The first letter warned that inadvertent mishandling of the suture could lead to its weakening or breakage (A 001). The second letter warned that the use of a single continuous suture sewn from one end to the other could lead to a disruption of the suture line. That letter went on to suggest an alternative technique: using *two* sutures

inserted at opposite ends of the incision and tying them together by sewing each toward the middle (A 005).

Plaintiff was well aware of the significance of these letters. Not only had she requested that Ethicon admit to their authenticity, but *she included them as evidence in her opposition to the motions by Dr. Mungas and MDMC for summary judgment*. In so doing, plaintiff argued that:

> "Ethicon has determined that unless the surgeon employs a technique whereby the sutures are placed 'at each end of the wound' and 'are then run toward the middle of the wound', [a technique described in the 'Dear Doctor' letter] a continuous or running suture such as was used by Dr. Mungas may cause 'disruption of straight, continuous suture lines'."

Dr. Mungas' Testimony: At his deposition, Dr. Mungas described the method he used to secure the suture during plaintiff's initial surgery (A 044-45). The method he described was the disfavored single running suture technique which Ethicon's second "Dear Doctor" letter warned against.

Dr. Collier's Testimony: Plaintiff's own expert, Dr. Collier, testified in his deposition that, in his own surgery, he utilizes the technique recommended by Ethicon (working from both ends toward the middle with two sutures) rather than the technique employed by Dr. Mungas (working from one end to the other with a single suture). As he testified (A 185-86):

> "It's the way I've been taught. It's the way most people do it."

Thus the "concealed" opinion of Ethicon's expert, Dr. Olcott, changed nothing. Dr. Olcott produced no additional materials or factual information. He merely gave his opinion based upon his training and experience, his review of plaintiff's medical records, and Dr. Mungas' deposition. These materials were available to plaintiff's own expert, who—

undoubtedly for reasons of litigation strategy—chose not to draw any conclusion regarding Dr. Mungas' technique. Ethicon was thus defaulted because the trial court blamed Ethicon for allowing the case against Dr. Mungas to be dismissed, even though plaintiff could have avoided that dismissal by asking *her own expert* to opine as to Dr. Mungas' use of a disfavored suturing technique.

2. Ethicon's "Evasive" Discovery Responses

Even assuming that Ethicon's discovery responses were evasive because they failed to disclose Dr. Olcott's opinion regarding Dr. Mungas' technique, the question which must be addressed is whether those responses support a presumption that Ethicon had no evidence to offer in its defense, thereby warranting the striking of its answer. No such presumption conceivably exists in this case. In all of Ethicon's responses relating to its expert, and to the merits of its defense, it is crystal clear that Ethicon contended that Mrs. Eisenmenger's injuries were not caused by a defective Ethicon suture and that it intended to contest that claim at trial.

Ethicon's Expert Disclosure: The trial court criticized Ethicon's formal expert witness disclosure. But that disclosure was not significantly different from plaintiff's. Ethicon's disclosure listed Dr. Olcott as one of its two experts and stated the following (A 167-69):

> "Cornelius Olcott IV, M.D., Palo Alto, California."

Plaintiff's disclosure had been provided two months earlier. It reads in its entirety:

> "Paul E. Collier, M.D.
> Surgical Associates of Sewickley, Ltd.
> Suite 200, Edgeworth Commons
> 301 Ohio River Boulevard
> Sewickley, Pennsylvania 15143

> Medical expert on causation of Mrs. Eisenmenger's stroke and subsequent disability."

Plaintiff's subsequent disclosure listing a second expert was equally brief (A 170). Likewise, the expert disclosures of Dr. Mungas (A 164-66) and MDMC (A 173-75) were similar in their brevity. All of these disclosures were brief for one simple reason: it was anticipated by the parties that the views of the various experts would be established via deposition—which is precisely what happened.

Ethicon's Interrogatory Answers: The trial court highlighted Ethicon's answers to several interrogatories and concluded that they constituted a deliberate concealment of Dr. Olcott's opinion (15a). But these answers show that plaintiff was repeatedly put on notice that Ethicon intended to argue that the opening of the incision may have been caused by Dr. Mungas and/or MDMC, rather than by a defect in the suture.

On December 9, 1991, a month before the summary judgment motions were filed, Ethicon filed responses to interrogatories from Dr. Mungas and MDMC. These interrogatories asked whether Ethicon contended that either entity was responsible for plaintiff's injuries. Ethicon's response included the following (A 198-200):

> "Based on its investigation of the postoperative dehiscence experienced by plaintiff following her surgery in October 1985, Ethicon contends that such dehiscence was not due to any inherent properties of PROLENE* suture material or to Ethicon's manufacturing procedures or labeling information, but rather to inadvertent suture damage or mishandling during its use, the precise nature of which is unavoidably unknown to Ethicon, by one of the individuals present in the operating room at the time of surgery, *or to the surgical technique employed by one of those same individuals*."

On two prior occasions, Ethicon gave similar responses to interrogatories propounded by plaintiff. For example, Ethicon responded to a series of interrogatories from plaintiff which inquired about Dr. Mungas' handling of the suture. It answered as follows:

> "It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent surgeon mishandling. Ethicon does not know and may never know, what may have occurred. Ethicon has not had an opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject."

As noted above, the interrogatory answers cited by the trial court were merely a part of the extensive discovery taken by plaintiff. Ethicon's conduct during that discovery shows that it vigorously contested plaintiff's claim that the suture in question was defective. Ethicon's position is exemplified by the information that was elicited at the four medical depositions which occurred *prior* to the filing of the summary judgment motions. During each deposition there was a discussion of the suturing technique employed by Dr. Mungas.

> *Dr. Mungas*: Plaintiff's counsel questioned Dr. Mungas in detail about the suturing technique he employed while operating on Mrs. Eisenmenger, including his use of a "running" or "continuous" stitch to close the arteriotomy (A 042-45). Dr. Mungas was also asked whether there was "any problem" in closing a carotid endarterectomy with a continuous running suture and whether he had

continued using the same method after the Eisenmenger incident (A 046-49).

Dr. Lauritzen: Dr. Lauritzen, a surgeon who assisted in the operation, was question by Ethicon's counsel about the suturing technique used by Dr. Mungas, specifically his use of a running suture that is formed "distally towards proximally" (A 053-56). Ethicon's counsel also asked Dr. Lauritzen if he had an opinion as to why the suture ruptured, stating that this was "a key point in this lawsuit" (A 057).

Dr. Collier: Dr. Collier is a vascular surgeon who served as plaintiff's expert. In response to questions by counsel for MDMC, Dr. Collier testified that, like Dr. Mungas, he uses a running stitch and that Dr. Mungas' technique is "standard" and "pretty much the same way everybody does it in the country" (A 178-79 and A 180-81). However, when examined by Ethicon's counsel, Dr. Collier conceded that he himself utilizes two sutures: one "at the top" and one "at the bottom" and then sews "toward the middle". He added that this method—not the single running suture method described by Dr. Mungas—was the "standard" and that "every textbook" describes this method (A 183-86).

Dr. Marshall: Dr. Marshall formerly served as Ethicon's Director of Medical Affairs and authored Ethicon's two "Dear Doctor" letters. Dr. Marshall was interrogated at length about the different techniques for suture closure. He stated that the more common technique was to use two sutures and to begin at the two ends and sew toward the middle (A 249-52). He was also asked about the technique utilized by Dr. Mungas and responded that it was the very technique that doctors were warned about in Ethicon's second "Dear Doctor" letter (A 253).

In sum, Ethicon's responses to the specific interrogatories in question, and to discovery in general, made it clear that Ethicon intended to argue at trial that (i) its suture was not defective, (ii) the opening of the incision was not due to any cause within Ethicon's control, and (iii) the opening was caused by inadvertent damage or mishandling by someone in the operating room or by improper surgical technique. This is the antithesis of a defendant whose silence bespeaks an inability to offer a defense to the claims against it. A presumption that Ethicon had no defense to plaintiff's claim is therefore totally inappropriate.

II

THERE IS A SPLIT AMONG THE CIRCUIT COURTS AS TO WHETHER THIS COURT'S DECISION IN NATIONAL HOCKEY LEAGUE VITIATES THE HAMMOND PACKING DOCTRINE

The Montana Supreme Court held that the *Hammond Packing* presumption is not a "blanket rule" governing the entry of all discovery-abuse default judgments (16a). To the contrary, it ruled that due process can be satisfied merely by a finding that the defaulted party's conduct involved "willfulness, bad faith, or fault" (16a). The Montana Supreme Court is not alone in this belief. In recent years, more and more courts have cited *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976), for this very proposition.

A. The NHL Decision

In *National Hockey League*, an antitrust action against the NHL had been dismissed by the District Court due to the plaintiff's failure to file interrogatory answers despite repeated admonitions, including a warning that further failure would result in the imposition of sanctions. Following a

reversal of that ruling by the Third Circuit, this Court reinstated the District Court's decision, holding that dismissal was a proper exercise of the court's discretion under Rule 37(b). In a *per curiam* opinion, this Court held that (p. 643):

> "Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities."

The opinion did not mention due process, *Hovey*, or *Hammond Packing*. The sole focus was whether, under the record in that case, the District Court had "abused its discretion" in granting a dismissal (*Id.* at 642). But this does not mean that due process is no longer part of the inquiry when a default judgment is entered under Rule 37. In fact, this Court's subsequent decision in *Insurance Corporation of Ireland* v. *Compagnie des Bauxites, supra*, makes it clear that the *Hammond Packing* requirement survives *National Hockey League*.

Insurance Corporation involved a group of foreign insurance companies who claimed that they were not subject to personal jurisdiction in the District in question. Following their refusal to comply with orders directing them to provide discovery regarding their contacts with that District, the court entered, as a sanction, a finding that the companies were subject to jurisdiction within the District. In affirming, this Court pointed out that the District Court's entry of the jurisdictional finding was consistent with the requirement of *Hammond Packing*, since the companies' refusal to provide jurisdictional discovery was tantamount to an admission that their jurisdictional defense was without merit. As Justice White explained (456 U.S. at 705-06):

"Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), for the due process limits on such rules. There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. Such a rule was permissible as an expression of 'the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered. . . . [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.' *Id.*, at 350-351.

The situation in *Hammond* was specifically distinguished from that in *Hovey* v. *Elliott*, 167 U.S. 409 (1897), in which the court held that it did violate due process for a court to take similar action as 'punishment' for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209-213 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see Part III), then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver."[2]

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[2] A "proper application" of Rule 37(b)(2) would be constitutional "as a matter of law" because it would involve (i) a court order to provide specific discovery, (ii) a refusal to comply with that order and (iii) a preclusion sanction tailored to the discovery that was refused. None of these elements is present in this case. Moreover, the Montana Supreme Court purported to decide this case under Rule 37(d), not 37(b).

In short, the due process requirement of *Hovey* and *Hammond Packing* was not extinguished by *National Hockey League*. That requirement, along with the more general "abuse of discretion" standard of *National Hockey League*, coexist in cases where the sanction is a default judgment. As we show below, some Circuits—and some state supreme courts—follow this dual requirement. On the other hand, a majority of Circuits and many state courts focus *solely* on the abuse of discretion analysis and make no inquiry into whether the requirements of due process have been met.

B. The Courts Which Follow Hammond Packing

Two Circuits—the Fifth and the Ninth—explicitly apply the *Hammond Packing* presumption doctrine. The same is also true of several states.

Ninth Circuit

The Ninth Circuit (which includes Montana) has long held that, under *Hovey* and *Hammond Packing*, a default judgment is only appropriate where the party's conduct gives rise to a presumption that it has no evidence to offer in support of its claims or defense. *Adriana Int'l Corp.* v. *Thoeren*, 913 F.2d 1406 (9th Cir. 1990); *Fjelstad* v. *American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985); *Munoz-Santana* v. *U.S. I.N.S.*, 742 F.2d 561 (9th Cir. 1984); *S.E.C.* v. *Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982); *United States* v. *Sumitomo Marine & Fire Ins. Co. Ltd.*, 617 F.2d 1365 (9th Cir. 1980).

A good example is *S.E.C.* v. *Seaboard*. In that case the District Court had entered a default judgment against a party who had given a deposition following a court order directing him to do so but had refused to pay a fine that was imposed due to his initial refusal to submit to the deposition. The Ninth Circuit reversed, pointing out that the presumption necessary to sustain a default judgment was not present (666 F.2d at 417):

> "The question raised by the instant case, therefore, is whether it illustrates an attempt to exercise the punitive power struck down in *Hovey*, or whether it involves an exercise of the court's power to presume that a party who fails to produce evidence does so because the evidence will not help his case."

Fifth Circuit

Chilcutt v. *United States*, 4 F.3d 1313 (1993), was a suit against the United States for a post office slip and fall. Following the Government's repeated violation of orders requiring it to comply with various discovery requests—including its denial of the existence of an accident log itemizing other slip and fall occurrences at the same location—the District Court sanctioned the Government by entering a finding that the *prima facie* elements of plaintiff's case on liability were deemed established. The Fifth Circuit affirmed, pointing out that the Government's conduct in hiding critical evidence (such as the accident log) justified a presumption that it was liable. It stated (4 F.3d at 1324):

> "When parties present no valid objections to discovery and intentionally withhold properly requested information, courts have the authority to presume that the party's refusal to produce the information is 'an admission of the want of merit in the asserted defense.' *Hammond*, 212 U.S. at 351, 29 S.Ct. at 380; *see also Insurance Corp. of Ireland*, 456 U.S. at 709, 102 S.Ct. at 2107. Based upon the facts of this case, we believe that the district court was well within its discretion to presume, for the purposes of this case, that the plaintiffs' liability claims were established."

States

The following states explicitly apply the *Hammond Packing* requirement in reviewing the entry of default judgments:

Arizona: *Sears Roebuck and Co.* v. *Walker*, 621 P.2d 938 (Ct. App. 1980).

Florida: *Heimer* v. *Travelers Insurance Co.*, 400 So.2d 771 (Dist. Ct. App. 1981).

Texas: *TransAmerican Natural Gas Corp.* v. *Powell*, 811 S.W.2d 913 (1991).

C. The Courts Which Ignore Hammond Packing

In recent years, a majority of Circuits have reviewed discovery abuse default judgments *solely* in the context of abuse of discretion. In doing so, they have invariably cited this Court's decision in *National Hockey League* as supporting the issuance of a default judgment so long as the defaulted party's conduct constitutes "willfulness", "bad faith" or "fault". In many of these cases, the defaulting party's conduct was such that the *Hammond* presumption was undoubtedly satisfied. Nevertheless, in none of the cases did the court cite, much less analyze, the due process requirement of *Hovey* and *Hammond Packing*.

A typical example is *Marx* v. *Kelly, Hart & Hallman, P.C.*, 929 F.2d 8 (1st Cir. 1991). This was a legal malpractice case which was dismissed due to the plaintiff's failure to comply with a document request. In affirming the default sanction, the First Circuit treated the matter solely as a question of abuse of discretion. As the Court stated (929 F.2d at 10):

> "The choice of sanctions for failing to comply with an order of the district court lies within the sound discretion of the court. *Spiller v. U.S.V. Laboratories, Inc.*, 842 F.2d 535, 537 (1st Cir. 1988). Absent an abuse of discretion, this court will not disturb a district court's dismissal of an action for failure of the plaintiff to comply with court orders. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976). The question on appeal is not

> whether the appellate court would, under the same circumstances, have imposed a more lenient penalty, but whether the district court abused its discretion in imposing the sanction it did. *Velazquez-Rivera v. Sea-Land Service, Inc.*, 920 F.2d 1072, 1075 (1st Cir. 1990). A plaintiff who appeals from a Rule 37 dismissal bears a heavy burden of demonstrating that the district judge was clearly not justified. *Damiani v. Rhode Island Hospital*, 704 F.2d 12, 17 (1st Cir. 1983).
>
> To be sure, the district court's sanction must be 'just'. . . . Nonetheless, the Supreme Court has made it plain that the availability of dismissal as a sanction is essential to deter and penalize egregious conduct. *National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781."

The following Circuits also treat this issue solely as an abuse of discretion question:

Third Circuit: *Hoxworth* v. *Blinder, Robinson & Co., Inc.*, 980 F.2d 912 (1992).

Fourth Circuit: *Mutual Federal Sav. & Loan* v. *Richards & Associates*, 872 F.2d 88 (1989).

Seventh Circuit: *Crown Life Ins. Co.* v. *Craig*, 995 F.2d 1376 (1993); *Philips Medical System Int'l, B.V.* v. *Bruetman*, 982 F.2d 211 (1992); and *Metropolitan Life Ins. Co.* v. *Estate of Cammon*, 929 F.2d 1220 (1991).

Eighth Circuit: *Comiskey* v. *JFTJ Corp.*, 989 F.2d 1007 (1993).

Tenth Circuit: *Jones* v. *Thompson*, 996 F.2d 261 (1993).

Eleventh Circuit: *Malautea* v. *Suzuki Motor Company, Ltd.*, 987 F.2d 1536, *cert. denied*, 114 S. Ct. 181 (1993).

D.C. Circuit: *Founding Church of Scientology* v. *Webster*, 802 F.2d 1448 (1986), *cert. denied*, 484 U.S. 871 (1987).

This approach is also followed by several states:

Connecticut: *Pavlinko* v. *Yale-New Haven Hospital*, 470 A.2d 246 (1984).

Florida: *Mercer* v. *Raine*, 443 So.2d 944 (1983).

Hawaii: *Shipman* v. *Hawaiian Holiday Macadamia Nut*, 802 P.2d 1203, *cert. denied*, 833 P.2d 901 (1990).

Idaho: *Devault* v. *Steven L. Herndon, P.C.*, 684 P.2d 978 (1984).

Montana: *Jerome* v. *Pardis*, 783 P.2d 919 (1989).

North Dakota: *St. Aubbin* v. *Nelson*, 329 N.W.2d 874 (1983).

Wisconsin: *Johnson* v. *Allis-Chalmers Corp.*, 470 N.W.2d 859 (1991).

* * *

In sum, there is a very real conflict among the Circuits and among the States as to whether the *Hammond Packing* doctrine applies to default judgment cases in light of this Court's decision in *National Hockey League*. Due to the seriousness of this issue, and the increasing frequency with which default judgments are being entered, it is important that this conflict be resolved.

III

THE NATION'S COURTS SHOULD BE CAUTIONED THAT THE TREND TOWARD MORE SEVERE SANCTIONS AS A PUNISHMENT FOR DISCOVERY ABUSE MUST BE TEMPERED BY CONCERN FOR A PARTY'S DUE PROCESS RIGHTS

Two years ago, a commentator writing on the subject of discovery abuse observed that:

> "Discovery abuse has become almost like the weather: everyone talks about it, but no one does anything about it."[3]

While the author's observation about the pervasiveness of discovery abuse was undoubtedly accurate, his complaint that not much is being done about it was off the mark.

Following this Court's opinion in *National Hockey League*, the courts have been far more severe in imposing sanctions under Fed. R. Civ. P. 37, including the ultimate sanction of default. As the Seventh Circuit observed in *Metropolitan Life Insurance*, (929 F.2d at 1224):

> "For a long time courts were reluctant to enter default judgments, and appellate courts were reluctant to sustain those that were entered. Courts emphasized that litigants are entitled to decisions on the merits, and that default is a harsh sanction. Those times are gone. *National Hockey League* told appellate judges to respect the district judge's choice of sanction. And district judges have become more aggressive in using their ultimate weapon to promote the efficient conduct of litigation. More power to them."

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[3] Dudley, *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. Rev. 189, 189 (1992).

Not only are preclusive sanctions becoming more common, but default judgments for enormous sums of money are being routinely entered. Ethicon is only one of a growing number of litigants to be saddled with a multi-million-dollar default judgment as a sanction for discovery abuse. Other recent examples, all of which were affirmed on appeal, include:

- *Malautea* v. *Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir. 1993) (default judgment in multi-million-dollar product liability case, damages trial pending).
- *Frame* v. *S-H, Inc.*, 967 F.2d 194 (5th Cir. 1993) ($10.2 million default judgment in fraud suit);
- *Philips Medical System* v. *Bruetman*, 982 F.2d 211 (7th Cir. 1992) ($19 million default judgment in fraud and breach of contract suit);
- *Hoxworth* v. *Blinder*, 980 F.2d 912 (3d Cir. 1992) ($73 million default judgment in securities fraud case);
- *Adriana Int'l Corp.* v. *Thoeren*, 913 F.2d 1406 (9th Cir. 1990) ($8.5 million default judgment in fraud and breach of contract case); and
- *Mutual Federal Savings & Loan* v. *Richards & Associates, Inc.*, 872 F.2d 88 (4th Cir. 1989) ($8 million default judgment in fraud/RICO suit).

On the whole, this trend may be appropriate. Nevertheless, there is a very real risk that, in their zeal to eradicate discovery abuse, the nation's courts will do so at the expense of a party's procedural and due process rights. In virtually all of the above cases, the court simply recited that Rule 37 permits the entry of a default judgment for discovery abuse and then, based upon the District Court's finding of "willfulness" and "bad faith", concluded that the default sanction was within the trial court's discretion.

This is not enough. Not only does Rule 37 incorporate an elaborate procedure for the entry of discovery sanctions

(which procedure was totally ignored in Ethicon's case), it also incorporates due process safeguards. As the Advisory Committee said in connection with the adoption of the Federal Rules in 1937:

> "The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 1909, 29 S.Ct. 370, 212 U.S. 322, 53 L.Ed. 530, 15 Ann.Cas. 645, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 1897, 17 S.Ct. 841, 167 U.S. 409, 42 L.Ed. 215, for the mere purpose of punishing for contempt."

What this means is that the sanction—whether the preclusion of a piece of evidence or the striking of a claim or defense—must be based upon a presumption that the party's failure to come forth with the discovery in question constitutes an admission that the party possessed no such evidence. Thus where the sanction is the entry of a default judgment, the record must support a presumption that the party had no evidence at all to offer in its own behalf. This due process limitation on Rule 37 sanctions was noted by this Court in *Societe Internationale* v. *Rogers*, *supra*, where it stated that (357 U.S. at 209):

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. . . The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.), p. 4325."

The decision of the Montana Supreme Court makes a mockery of these due process concerns. The decision has resulted in a denial of a defendant's right to defend a lawsuit on the merits in a case where the defendant participated for more than two years in wide-ranging discovery and was never placed on notice that there was *any* issue regarding the sufficiency of *any* of its discovery responses. Bluntly stated, what happened to Ethicon is a vivid example of anti-discovery abuse fervor run amok.

Furthermore, viewed in the context of the widespread concern over "discovery abuse" and "litigation gamesmanship", the decision below will offer a tempting precedent for weary trial court judges. The consequences could be awesome. If, as happened here, a party can be defaulted upon a finding that its previously uncontested discovery responses were "evasive" and "incomplete" (16-17a), there will be no limit to a court's power to punish a party for discovery abuse—real or imagined. If Ethicon can be defaulted under these circumstances, so can any party who is found on an after-the-fact basis to have given an "evasive" discovery response.

The decision below is a dangerous precedent because it holds out the promise of an easy "fix" to the very real discovery ills that plague the nation's courts. But the "fix" imposed in this case is constitutionally prohibited. It should be corrected by this Court before it becomes a nationwide trend.

CONCLUSION

Ethicon's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 93-034—1994

HELEN KIRWIN EISENMENGER, an incapacitated person, by Veronica Eisenmenger, her Guardian and Conservator,

Plaintiff, Respondent and Cross-Appellant,

v.

ETHICON, INC., a New Jersey corporation,

Defendant and Appellant,

and

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Defendants and Cross-Respondents.

APPEAL FROM: District Court of the Eighth Judicial District, In and for the County of Cascade, The Honorable R. D. McPhillips, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Maxon Davis, Cure, Borer & Davis, P.C., Great Falls, Montana; Charles F. Preuss, Preuss, Walker & Shanagher, San Francisco, California

For Respondents:

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James E. Aiken and Tracy Axelberg, Jardine, Stephenson, Blewett & Weaver, P.C., Great Falls, Montana (Mungas)

Neil E. Ugrin, Ugrin, Alexander, Zadick & Slovak, Great Falls, Montana (Montana Deaconess Medical)

Submitted: February 1, 1994
Decided: March 24, 1994

Filed:

[ILLEGIBLE]
Clerk

Chief Justice J. A. Turnage delivered the Opinion of the Court.

Helen Eisenmenger suffered serious injury after undergoing surgery in which suture material manufactured by defendant

Ethicon, Inc., was used. She filed this product liability claim against Ethicon in the District Court for the Eighth Judicial District, Cascade County. Ethicon appeals a $2.3 million judgment entered against it. We affirm.

We restate the dispositive issues as:

1. Whether the District Court erred in holding that the statute of limitations for Eisenmenger's product liability claim against Ethicon was tolled by § 27-6-702, MCA.

2. Whether the court erred in denying Ethicon's motion for summary judgment.

3. Whether the court erred in imposing a default sanction against Ethicon on the issue of liability.

On October 30, 1985, Helen Eisenmenger underwent a left carotid endarterectomy at the Montana Deaconess Medical Center (the hospital) in Great Falls, Montana. James E. Mungas, M.D., performed the surgery. The incision in Eisenmenger's left carotid artery was closed using 6-0 Prolene suture material manufactured and sold by Ethicon.

Two days later, while she was resting in her hospital room, Eisenmenger suddenly experienced bleeding in and from the surgical site. She was returned to the operating room, where Dr. Mungas performed a second, emergency surgery to repair a broken suture in the carotid artery incision. After the second operation, Eisenmenger suffered a stroke and resulting serious complications. There was little doubt that the broken suture caused Eisenmenger's stroke and subsequent complications; the question was what caused the suture to break.

In January 1988, Eisenmenger, through her guardian and conservator, filed a product liability suit against Ethicon in the District Court for Montana's Eighth Judicial District. Ethicon removed the case to federal court based on diversity jurisdiction. That case was eventually voluntarily dismissed, after this action was filed.

On October 27, 1988, again through her guardian and conservator, Eisenmenger filed a malpractice claim with the

Montana Medical Legal Panel against Dr. Mungas and the hospital. She named Ethicon as an "other necessary and proper part[y]" to that claim. After the panel rendered its decision, Eisenmenger filed this action on March 30, 1989.

Ethicon promptly moved for summary judgment, arguing that the general three-year tort statute of limitations on the claim against it had run. The court denied Ethicon's motion, holding that § 27-6-702, MCA, tolled the statute of limitations during the Medical Legal Panel's decision-making process and for thirty days thereafter.

Almost three years later, in February 1992, the court entered summary judgment in favor of Dr. Mungas and the hospital, holding that the theory of res ipsa loquitur was not applicable to the claims against those defendants and that Eisenmenger had produced no evidence of negligence by those defendants. At the same time, the court denied Ethicon's motion for summary judgment on grounds that it would be premature to rule out the admissibility of circumstantial evidence offered by Eisenmenger to show that there had been a manufacturing defect in the suture.

At the end of March 1992, Eisenmenger deposed Ethicon's witness Dr. Olcott, a professor of surgery at Stanford University. Dr. Olcott's opinions, as stated in his deposition, clearly supported a theory that conduct of Dr. Mungas or the hospital could have been the cause of the suture breakage leading to Eisenmenger's injuries. Ten days later, Eisenmenger filed a motion asking the court to assess sanctions against Ethicon for failure to disclose Dr. Olcott's opinions in response to discovery requests dating back to 1988.

In its order granting Eisenmenger's motion, the court stated that Ethicon had made a "knowing concealment" of Dr. Olcott's testimony, and that, had the court known of Dr. Olcott's testimony it was "very doubtful" that Dr. Mungas's motion for summary judgment would have been granted. The court concluded Eisenmenger had suffered extreme prejudice due to Ethicon's discovery abuses and that she was entitled to sanctions. It entered a default judgment against Ethicon on the issue of liability.

The case was tried to a jury for purposes of determining the amount of damages. Following the jury's verdict that Eisenmenger's damages totaled $2,308,155, Ethicon appeals. Eisenmenger and Dr. Mungas have each raised issues on cross-appeal but, as a result of our resolution of the issues raised by Ethicon, we do not reach those issues.

ISSUE 1

Whether the District Court erred in holding that the statute of limitations for Eisenmenger's product liability claim against Ethicon was tolled by § 27-6-702, MCA.

Section 27-6-702, MCA, which is part of the Montana Medical Legal Panel Act (Act), provides:

> The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the director of the application for review as to all health care providers named in the application as parties to the panel proceeding and as to all other persons or entities named in the application as necessary or proper parties for any court action which might subsequently arise out of the same factual circumstances set forth in the application.

Ethicon contends § 27-6-702, MCA, tolls the statute of limitations in malpractice claims only, and not in product liability claims such as this one.

Ethicon's position reflects the reference, at the beginning of the statute, to "a malpractice claim." "Malpractice claim" is defined at § 27-6-103(5), MCA, as a claim or potential claim "against a health care provider." "Health care provider" is defined under § 27-6-103(3), MCA, to mean a physician, a dentist, or a health care facility.

Because "malpractice claim" is defined as a claim against a "health care provider," the statement in § 27-6-702, MCA, that the statute of limitations is tolled as to "all health care providers named in the application" addresses most "malpractice claims" as defined in the Act. The only excep-

tion initially appears to be malpractice claims against health care providers not named in the application. However, § 27-6-702, MCA, further provides that the tolling applies also "as to all other persons or entities named . . . as necessary or proper parties for any court action . . . out of the same factual circumstances." We conclude that § 27-6-702, MCA, is ambiguous about the types of claims for which it tolls the statute of limitations.

If the plain words of a statute are ambiguous, the next step in judicial interpretation of the statute is to determine the intent of the legislature. Montana Contractors' Ass'n. v. Dept. of Hwys. (1986), 220 Mont. 392, 394, 715 P.2d 1056, 1058. This is accomplished by examining the legislative history of the statute, including the title of the original bill. *Montana Contractors' Ass'n.*, 715 P.2d at 1058; Gaub v. Milbank Ins. Co. (1986), 220 Mont. 424, 428, 715 P.2d 443, 445.

Section 27-6-702, MCA (1983), read:

> The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the director of the application for review and does not begin again until 30 days after the panel's final decision is entered in the permanent files of the panel and a copy is served upon the complainant and his attorney by certified mail.

(Enacted 17-1314 by Sec. 14, Ch. 449, L. 1977.) The 1985 amendment to § 27-6-702, MCA, added the following language to the first sentence of the statute:

> as to all health care providers named in the application as parties to the panel proceeding *and as to all other persons or entities named in the application as necessary or proper parties for any court action which might subsequently arise out of the same factual circumstances set forth in the application.* [Emphasis added.]

The 1985 amendment to § 27-6-702, MCA, unquestionably created the ambiguity with which we are faced.

The title to the 1985 amending act and the explanation offered with the proposed amendment to § 27-6-702, MCA, are instructive. The title to the amending act stated:

> AN ACT REVISING THE MONTANA MEDICAL LEGAL PANEL ACT BY CLARIFYING THE DEFINITIONS OF "HEALTH CARE FACILITY," "MALPRACTICE CLAIM," AND "PHYSICIAN," CLARIFYING THE ALLOCATION OF ASSESSMENTS AND DETERMINATION OF ASSESSMENTS; PROVIDING FOR A LATE FEE FOR DELINQUENT ASSESSMENTS; CLARIFYING THE COMPOSITION OF THE PANEL; *CLARIFYING THE TOLLING OF THE STATUTE OF LIMITATIONS AGAINST PARTIES NOT PARTIES TO THE CLAIM* AND PROVIDING FOR DISMISSAL OF CLAIMS AND THE RUNNING OF THE STATUTE OF LIMITATIONS; AMENDING SECTIONS 27-6-103, 27-6-306, 27-6-301, 27-6-303, 27-6-401, AND 27-6-702, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE [Emphasis supplied.]

Ch. 332, L. 1985. The explanation offered by the Montana Medical Legal Panel for the proposed amendment was:

> The current statute is unclear as to whether the statute does or does not toll as to those not parties to the panel, such as nurses, under circumstances where physicians in the same matter are brought before the panel. The proposed legislation clarifies this, providing for the tolling of the statute as to all those parties named in the application, whether proper health care providers before the panel or not.

Exhibit D to minutes House Judiciary Committee, February 19, 1985.

The legislative history of § 27-6-702, MCA, supports the conclusion that the tolling provision applies not only to malpractice claims, as argued by Ethicon, but also to actions against all other persons or entities named in the application as necessary or proper parties for any court action arising out of the same facts. This conclusion is further supported by the

rule that an ambiguous statute of limitations should be interpreted, in the interest of justice, to allow the longer period in which to prosecute the action. See James v. Buck (Idaho 1986), 727 P.2d 1136, 1138 (citing cases from Alaska, Hawaii, Arizona, and Utah). We note that Ethicon has long had notice of its alleged liability in this action, minimizing any surprise or prejudice to it from the interpretation we now give to § 27-6-702, MCA.

In this case, the application for review of claim which Eisenmenger filed with the Montana Medical Legal Panel listed Ethicon as an "other necessary and proper part[y]." We hold that the District Court did not err in ruling that the statute of limitations was tolled as against Ethicon.

ISSUE 2

Whether the court erred in denying Ethicon's motion for summary judgment.

This Court's standard of review of a ruling on a motion for summary judgment is the same as a district court's standard in ruling on such a motion: whether the record discloses genuine issues of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P.; Knight v. City of Missoula (1992), 252 Mont. 232, 243, 827 P.2d 1270, 1276.

Ethicon contends that Eisenmenger and the District Court improperly relied on the doctrine of res ipsa loquitur in opposing and denying its motion for summary judgment. Ethicon correctly states that the theory of res ipsa loquitur is not applicable in products liability cases under a strict liability theory. Rix v. General Motors Corp. (1986), 222 Mont. 318, 332, 723 P.2d 195, 204. But neither the District Court nor Eisenmenger relied solely on that theory. They also relied upon a theory of strict liability.

Eisenmenger admits that, at the time Ethicon moved for summary judgment, she had no direct evidence that the suture which broke was defective. However, she maintains she had

sufficient circumstantial evidence that the suture was defective to preclude summary judgment. A claim of product defect may be proven by circumstantial evidence. Brandenburger v. Toyota Motor Sales, U.S.A., Inc. (1973), 162 Mont. 506, 517, 513 P.2d 268, 274.

The broken suture was thrown away during Eisenmenger's second surgery. As pointed out in Eisenmenger's brief opposing Ethicon's motion for summary judgment, the only direct evidence concerning the break in this suture was Dr. Mungas's deposition testimony that the suture broke at its midpoint, or between the knots. Eisenmenger cites evidence it produced that, if stress is applied to a nondefective suture, the suture will break at the knot, rather than between the knots. Thus, Eisenmenger argues, the testimony of Dr. Mungas was evidence that the suture was either defective or mishandled. All of the persons assisting with the surgery denied having observed or done anything that damaged or otherwise compromised the suture. No direct evidence was produced to contradict their testimony, and their credibility on this issue is a question of fact.

Eisenmenger also points to circumstantial evidence she marshalled concerning other incidence of failure of Ethicon's Prolene 6-0 suture material. Ethicon argues that this evidence is inadmissable. However, in denying Ethicon's motion for summary judgment, the District Court stated that it had not yet determined whether all of the evidence of other incidents of suture failure would be admissible. All reasonable inferences from the offered proof are to be drawn in favor of the party opposing summary judgment. Reaves v. Reinbold (1980), 189 Mont. 284, 287, 615 P.2d 896, 898.

We hold that the court did not err in ruling that Eisenmenger demonstrated issues of material fact precluding the entry of summary judgment in favor of Ethicon.

ISSUE 3

Whether the court erred in imposing a default sanction against Ehicon on the issue of liability.

Eisenmenger's motion for sanctions was made under Rule 37(d), M.R.Civ.P., which authorizes a district court to award sanctions:

> if a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request[.]

Ethicon urges that subsection (d) would apply only if it had failed *completely* to answer interrogatories. In support of its position, it cites several cases decided under Rule 37(b), Fed.R.Civ.P. The value of those cases as precedent is distinctly limited because they were decided under a different subsection of the federal, not the state, rule.

In Vehrs v. Piquette (1984), 210 Mont. 386, 684 P.2d 476, this Court affirmed Rule 37(d) sanctions for unsigned, late not-fully-responsive answers to interrogatories. Therefore, a complete failure to answer interrogatories or otherwise respond to discovery requests is not required before sanctions are allowed under Rule 37(d), M.R.Civ.P. We conclude the District Court had the power to award sanctions in this case. We next examine whether the sanction of default judgment was justified.

In Audit Services v. Kraus Construction, Inc. (1980), 189 Mont. 94, 615 P.2d 183, this Court quoted with approval and applied the following standard for entering a default judgment as a sanction under Rule 37, M.R.Civ.P.:

> [T]he default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In

> that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection. Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy[.] [Citation omitted.]

Audit Services, 615 P.2d at 187-88. Ethicon cites *Audit Services* as authority that default judgment is proper only when there has been a complete failure to respond to discovery requests. But the last sentence quoted above supports a broader interpretation allowing default judgment as a sanction for other severe and deliberate discovery abuse.

Our standard of review of sanctions imposed for discovery abuses is whether the district court abused its discretion. First Bank (N.A.)—Billings v. Heidema (1986), 219 Mont. 373, 711 P.2d 1384. In discussing the district courts' ability to decide when sanctions are appropriate and how severe those sanctions should be, this Court has said:

> This Court has addressed the imposition of Rule 37, M.R.Civ.P., sanctions several times in the recent past. The primary thread binding each of those decisions is the deference this Court gives to the decision of the trial judges. . . . The trial judge is in the best position to know . . . which parties callously disregard the rights of their opponents and other litigants seeking their day in court. The trial judge is also in the best position to determine which sanction is the most appropriate.

Dassori v. Ray Stanley Chevrolet Co. (1986), 224 Mont. 178, 179-80, 728 P.2d 430, 431.

In his March 1992 deposition, Dr. Olcott testified concerning eight problems he saw with the Eisenmenger case: (1) that Dr. Mungas used a "substandard technique" of tying the suture; (2 and 3) that there was no indication for the first surgery performed, either by symptoms or the results of the arteriogram; (4) the arteriogram and the operation should not

have both been done on the same day; (5) in the second operation, Heparin was wrongly given after, not before, clamps were applied; (6) in the second operation, the arteriotomy was not completely reopened; (7) a patch was not used in redoing the arteriotomy; and (8) there was inappropriate monitoring during and following the second surgery. Dr. Olcott testified he was given the Eisenmenger case for review sometime in 1988 and that he advised Ethicon's counsel, "in general," of his opinions on these eight problems "in 1988."

In June 1990, by which date Dr. Olcott clearly had informed Ethicon's counsel of his opinion, Ethicon answered detailed discovery requests by Eisenmenger. Ethicon's answers were described by the District Court in its sanction order as "incomplete and evasive." Ethicon objected to an interrogatory about whether it took the position that Dr. Mungas failed to take the necessary precautions in using the suture, on grounds that the term "necessary precautions" was undefined. Ethicon stated that it was "unable to respond" to interrogatories about whether it contended that Dr. Mungas improperly tied the suture or that any act or omission of Dr. Mungas or an employee of the hospital caused or contributed to Eisenmenger's stroke. Ethicon further stated that it was "unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure."

In answer to an interrogatory asking it to set forth "each factor which you contend substantially contributed" to Eisenmenger's post-operative stroke, Ethicon responded:

> Many factors may contribute including age, history, smoking, general physical condition, wound dehiscence, and post-operative complications among many other possible factors. Ethicon intends to examine these as well as all other possibilities and may, depending on the outcome, offer expert medical opinion on this subject.

Dr. Olcott's name was first disclosed as a potential expert witness who might be called at trial on August 30, 1991. On

December 9, 1991, Ethicon and its attorney made the following discovery responses:

> *Interrogatory No. 1*: Is it your contention that Defendant James E. Mungas caused or contributed to the injuries or damages allegedly suffered or sustained by the Plaintiff, as more fully described in her Complaint? If so, please set forth with particularity and in detail:
>
> (a) each and every fact supporting this contention;
>
> (b) the identity of any and all persons who could or would testify as to the truthfulness of this contention; and
>
> (c) the identity of all writings, notes, letter, records, or any other document which could or would support the truthfulness of this contention.
>
> *RESPONSE TO INTERROGATORY NO. 1*: (a) Based on its investigation of the postoperative dehiscence experienced by plaintiff following her surgery in October 1985, Ethicon contends that such dehiscence was not due to any inherent property of PROLENE* suture material or to Ethicon's manufacturing procedures or labeling information, but rather to inadvertent suture damage or mishandling during its use, the precise nature of which is unavoidably unknown to Ethicon, by one of the individuals present in the operating room at the time of surgery, or to the surgical technique employed by one of those same individuals. Ethicon exercised no control over the suture after it left Ethicon's facility. Ethicon was not present during the time the suture was received, stored and handled by personnel from MDMC prior to its use during the surgery in question. Ethicon was not present in the operating room either during the initial operative procedure or the arteriotomy repair, when the suture was handled by operating room personnel, including Dr. Mungas, on multiple occasions and came into

contact with a variety of surgical instruments. Because the suture utilized in the initial closure of the arteriotomy was thrown away by Mr. [sic] Mungas, MDMC employees or other operating room personnel, Ethicon was deprived of the opportunity to examine this crucial piece of evidence, from which the cause of the dehiscence could be obtained. Moreover, because Dr. Mungas, MDMC employees or other operating room personnel did not keep track of the lot number from which the suture in question came, Ethicon was further deprived of the opportunity to demonstrate that such lot in particular met with Ethicon's manufacturing and quality control/quality assurance specifications in every respect. Thus, although Dr. Mungas was among those present in the operating room whose suture handling or surgical technique may have inadvertently caused or contributed to plaintiff's damages, or who, directly or indirectly, may have inadvertently mishandled, misused, altered or otherwise changed the suture material in question, Ethicon cannot say that Dr. Mungas was the sole individual responsible for the dehiscence. Nevertheless, no PROLENE* 6/0 suture material returned to Ethicon following an alleged postoperative dehiscence has failed to meet USP or Ethicon specifications, and Ethicon is of the opinion that the suture in this case was within USP and Ethicon specifications and has no present information or evidence to the contrary.

(b) All the individuals disclosed in the medical records or known to plaintiff and to Ethicon's co-defendants as well as those individuals disclosed in Ethicon's responses to the parties' discovery requests and/or the depositions of Ethicon's employees in this case.

(c) All written information produced or discovered in this case by all parties or available to the parties in the medical and scientific literature.

On the same date, Ethicon answered an interrogatory requesting information concerning the substance of and supporting facts for any expert opinion concerning mishandling, misuse, or alteration of the suture material by Dr. Mungas. In its response, Ethicon merely referred to the above answer and to its expert witness disclosure, which set forth only the names of the experts. It provided no further information.

Summary judgment was entered in favor of Dr. Mungas and the hospital some six months after Ethicon disclosed Dr. Olcott as an expert witness. During those months, Ethicon did not update its discovery responses to disclose Dr. Olcott's opinions, despite its clear duty to do so under Rule 26(e), M.R.Civ.P. Dr. Olcott was not made available to be deposed until a month after Dr. Mungas and the hospital had been dismissed from this lawsuit. By that time, severe prejudice had already occurred to Eisenmenger, and the court had few options for appropriate and meaningful sanctions against Ethicon. As the court stated, it was "very doubtful" that Dr. Mungas's motion for summary judgment would have been made or granted if Dr. Olcott's opinion had been disclosed. Ethicon's discovery abuses therefore directly interfered with a correct decision in the case.

Ethicon also argues that the evidence it withheld only inculpated Dr. Mungas, and that withholding the evidence did not prejudice Eisenmenger's case against Ethicon. However, as the District Court recognized and Ethicon admits, Ethicon would, if allowed, seek to use the concealed evidence at trial as relevant to causation. The concealed evidence clearly went to the heart of Ethicon's defense to Eisenmenger's claim.

This is not a situation where the "wrong" questions were asked in discovery and the critical answers were thereafter artfully avoided. There was nothing more which could have been asked in order to elicit from Ethicon the substance of Dr. Olcott's opinion. We conclude that the above answers to interrogatories and the failure to supplement the same demonstrate intolerable gamesmanship and obstructiveness on the part of Ethicon. Playing loose and fast with the rules of discovery, in

the guise of advocacy, is equivalent to playing Russian roulette with only one chamber empty—it cannot be relied upon to lead to a favorable result.

The record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith. This failure caused severe prejudice to Eisenmenger on an issue central to the case. We hold that the District Court did not abuse its discretion in imposing the sanction of default judgment on the issue of liability.

Finally, Ethicon contends it was deprived of its right to due process through entry of the default judgment as a sanction. It argues that Securities and Exchange Commission v. Seaboard Corp. (9th Cir. 1982), 666 F.2d 414, establishes that due process allows a sanction of default judgment only in response to a complete failure to produce requested evidence. We disagree. The basis for the holding in *Seaboard* was that the sanction in that case was imposed for failure to obey a court order to pay a fine arising out of discovery violations. The discovery requests had been complied with by the time sanctions were imposed. *Seaboard*, 666 F.2d at 417. In contrast, Ethicon never fairly answered the discovery requests at issue here.

Ethicon also claims due process requires that default judgment as a sanction for discovery abuse is only proper if the refusal to respond to discovery requests gives rise to a presumption that the party had no evidence on the point in question, citing Hammond Packing Co. v. Arkansas (1909), 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530. *Hammond* does not establish such a blanket rule. The holding therein that the creation of such a presumption meets the requirements of due process is not equivalent to a holding that the creation of such a presumption is required for purposes of due process.

Due process requires that default may not be imposed absent willfulness, bad faith, or fault. Societe Internationale v. Rogers (1958), 357 U.S. 197, 212, 78 S.Ct. 1087, 1096, 2 L.Ed.2d 1255, 1267. Here, as stated above, the court found that Ethicon's actions in giving evasive and incomplete

answers to discovery requests and in failing to supplement those answers "have been willful and in bad faith." In this case, the sanction of default judgment enforces due process by preventing Ethicon from profiting by its discovery abuse and by assuring due process to the opposing parties whose rights have been prejudiced. We hold that Ethicon's due process rights were not violated when the court ordered a sanction of default judgment on the issue of liability.

Affirmed.

J. A. TURNAGE
Chief Justice

We concur:

JOHN CONWAY HARRISON

[ILLEGIBLE]

WILLIAM E. HUNT SR.

[ILLEGIBLE]
Justices

Justice James C. Nelson respectfully dissents from the Court's opinion on Issue 1 and, consistent with that position, does not reach Issues 2 or 3.

While I acknowledge that the legislature's amendments to § 27-6-702, MCA, in 1985, created an ambiguity, I submit that we have erroneously resolved that ambiguity on the basis of what we perceive to be the intention of the legislature as derived from a legislative history that is, at best, inconclusive. In so doing, I suggest that we have impermissibly

inserted into the tolling provisions of the statute by implication, a class of claims that the legislature did not include by specific language or, in default of that, by a clearly expressed intention. Section 1-2-101, MCA.

In order to fully appreciate what the 1985 amendment did and did not accomplish, it is necessary to examine the amended § 27-6-702, MCA (1987), in the context of the entire Montana Medical Legal Panel Act (Act), rather than focusing, as does the Court's opinion, on simply the statute itself.[1]

Section § 27-6-702, MCA, defines the purpose of the Act as follows:

> The purpose of this chapter is to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

Section 27-6-103, MCA, defines various terms used in the Act. Of importance here are the following:

> (2) "Health care facility" means a facility . . . licensed as a health care facility under Title 50, chapter 5.
>
> (3) "Health care provider" means a physician, a dentist, or a health care facility.
>
> (4) "Hospital" means a hospital as defined in 50-5-101.
>
> (5) "Malpractice claim" means any claim or potential claim of a claimant against a health care provider for medical or dental treatment, lack of medical or dental treatment, or other alleged departure from accepted stan-

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[1] Unless otherwise specifically mentioned, all statutory references to the Act are to the 1987 version, since that is the version that was in effect when Eisenmenger filed her malpractice claim with the panel and when she filed her second complaint against Ethicon. Also, all emphasis in the cited statutes has been supplied by the author.

dards of health care which proximately results in damage to the claimant, whether the claimant's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(7) "Physician" means: [in pertinent part] (a) . . . an individual licensed to practice medicine under the provisions of Title 37, chapter 3, . . .

Section 27-6-105, MCA, provides, in pertinent part, that:

The [Montana Medical legal] panel shall review all malpractice claims or potential claims against health care providers . . . .

Section 27-6-302, MCA, provides, in pertinent part, that:

The application [to the panel] shall contain the following: (1) a statement in reasonable detail of the elements of the health care provider's conduct which are believed to constitute a malpractice claim, the dates the conduct occurred, and the names and addresses of all physicians, dentists, and hospitals having contact with the claimant and all witnesses; . . .

Section 27-6-304, MCA, provides, in pertinent part, that:

In instances where applications are received employing a theory of respondeat superior or some other derivative theory of recovery, the director shall forward the application to the state professional societies, associations, or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed and the health care provider named a respondent as employer, master, or principal.

Section 27-6-502, MCA, provides, in pertinent part, that:

(1) At the time set for hearing, the claimant submitting the case for review shall be present and shall make a

> brief introduction of his case, including a resume of the facts constituting the alleged professional malpractice which he is prepared to prove. The health care provider against whom the claim is brought and his attorney may be present and may make an introductory statement of his case.

Section 27-6-602, MCA, provides, in pertinent part, that:

> Upon consideration of all the relevant material, the panel shall decide whether there is: (1) substantial evidence that the acts complained of occurred and that they constitute malpractice; . . .

Section 27-6-701, MCA, provides that:

> No malpractice claim may be filed in any court against a health care provider before an application is made to the panel and its decision is rendered.

Section 27-6-702, MCA, provides in pertinent part:

> The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the director of the application for review as to all health care providers named in the application as parties to the panel proceeding and as to all other persons or entities named in the application as necessary or proper parties for any court action which might subsequently arise out of the same factual circumstances set forth in the application. The running of the applicable limitation period in a malpractice claim does not begin again until 30 days after either an order of dismissal, with or without prejudice against refiling, is issued from the panel chairman, or from the director upon the consent of the parties to the claim, or the panel's final decision, whichever occurs first, is entered in the permanent files of the panel and a copy is served upon the complainant or his attorney if he is represented by counsel, by certified mail.

Reading the plain language in the Act, without referring to any past or recent legislative history, and using the terms of art as those are defined in the Act, several conclusions follow:

First, the purpose of the Act is to screen and prevent the filing in court of ill-founded claims for professional acts or omissions against health care providers, which are defined to include only (i) physicians, (ii) dentists and (iii) licensed facilities. Sections 27-6-102, 27-6-103 (2), (3) and (7), MCA. Ethicon, being none of those, is not an entity subject to the protection of the Act.

Second, the professional act or omission (regardless of whether the theory is tort or contract) which is to be screened is "malpractice"—a term of art, defined in the Act as a claim or potential claim for medical treatment or other alleged departure from accepted standards of health care. Section 27-6-103(5), MCA.

The act or omission alleged to have been committed by Ethicon does not involve providing medical treatment or health care. Ethicon is alleged to have improperly manufactured a product—specifically, a surgical suture.

Third, the panel can only consider, hear and rule upon malpractice claims filed against health care providers. Sections 27-6-105, 27-6-302, 27-6-304, 27-6-502, 27-6-602, MCA. Ethicon is neither an entity subject to the jurisdiction of the panel, nor are its alleged acts or omissions subject to panel review, as defined in the Act.

Fourth, claimants are required to submit their claim or potential claim for "malpractice" against a "health care provider" to the panel before filing the claim in court. Sections 27-6-301, 27-6-302 and 27-6-701, MCA. There is nothing in the Act, however, to preclude a claimant from filing a related products liability suit in court *at any time* within the applicable statute of limitations, since the panel has no jurisdiction or review authority over any sorts of claims, except malpractice claims.

Fifth, the tolling of the statute of limitations under § 27-6-702, MCA, obviously applies to a ". . . malpractice claim . . . as to all [named] health care providers . . .". Moreover, under the 1985 amendment, the statute of limitations is also tolled as to ". . . all other persons or entities named in the application as necessary or proper parties for any court action which might subsequently arise out of the same factual circumstances set forth in the application." Section 27-6-702, MCA. The critical question is, however, "for *what claim* is the statute of limitations tolled?"

To answer that question, it is necessary to read the phrase added by the 1985 amendment in the context of the existing qualifying language of the statute both before and after the added phrase. First, the only "claim" that is referred to in § 27-6-702, MCA, (and, in fact, the only "claim" referred to in the entire Act) is the claim for "malpractice," a defined term of art—which Ethicon, by that definition, cannot commit.

Second, according to § 27-6-702, MCA, *the malpractice claim* is tolled:

(i) as to "health care providers," which, again, is a defined term of art which does not include Ethicon; and

(ii) "as to all other persons or entities named in the application as necessary or proper parties"—which Ethicon could be, *if* it could commit "malpractice" as defined by the Act.

Third, while the "court action which might subsequently arise out of the same factual circumstances" might, arguably, include a products liability claim, again, the only *claim* for which the statute of limitations is tolled is the *malpractice claim*. That conclusion is buttressed by the sentence which immediately follows the phrase added in 1985 which states that "[t]he running of the applicable limitation period *in a malpractice claim* does not begin again until 30 days after . . .". Section 27-6-702, MCA. Since the statute is very specific about when the statute of limitations on the malpractice claim begins to run again, it begs the question, assuming

arguendo that claims besides the malpractice claim are tolled, when the statute of limitations on those latter claims begins to run after the panel's decision. The statute is silent on that point.

Therein lies the ambiguity. Section 27-6-702, MCA, does not specify any other *claim*, besides the *malpractice claim*, for which the statute of limitations is tolled, nor does it refer to any other *claim*, besides the *malpractice claim*, on which the applicable limitation period begins to run again after the 30 days specified in the statute has elapsed.

From a plain reading of the entire Act, in context and without resort to legislative history, one necessarily concludes that the Act, including its tolling provisions, only applies to malpractice claims involving health care providers.

What, then, did the 1985 amendment accomplish? It is an established rule of statutory construction that we presume that the legislature would not pass meaningless legislation, and that we must harmonize statutes relating to the same subject, giving effect to each. Montana Contractors' Ass'n, Inc. v. Department of Highways (1986), 220 Mont. 392, 395, 715 P.2d 1056, 1058. Furthermore, § 1-2-101, MCA, mandates that "[w]here there are several provisions or particulars, [in a statute] such a construction is, if possible, to be adopted as will give effect to all." Hence, the need to resort to legislative history. Under the Court's rationale, there is no other way to give effect to the added language, absent giving it the construction which this Court has on the basis of what we perceive to be the intent of the legislature as gathered from the legislative history.

Were the legislature's intent clear, I would agree with the Court's interpretation of the statute. I do not concede, however, that the legislative history is as clearly indicative of the legislature's intent in enacting the 1985 amendments as our opinions seems to suggest.

Literally, the *only* group of persons actually referred to in the legislative history to HB 738 (enacted as Ch. 332, L. 1985) as being included within the added tolling language, are

nurses—who, according to the legislative history, did not want to be covered by the panel. See minutes of the House Judiciary Committee hearing on HB 738, February 19, 1985. There is no discussion in the history as to what sorts of *claims* the legislature intended would be covered under the added tolling language. The Act itself is silent as to who or what are "necessary or proper parties for any court action which might subsequently arise out of the same factual circumstances set forth in the application." Section 27-6-702, MCA. It can hardly be denied that the "factual circumstances" before the panel deal with malpractice. At most, it appears that the legislature arguably intended to toll the statute of limitations as to employees of the health care provider, e.g. nurses.

If it was the legislature's intention, by enacting the additional phraseology in § 27-6-702, MCA, to bring persons or entities other than health care providers within the tolling provisions of the statute, then the legislature merely needed to broaden the scope of the statute to include *claims other than malpractice claims*. Unfortunately, it failed to do that.

What the legislature did was change only one part of the statute—it expanded the tolling provisions of the statute to include ". . . other persons or entities named in the application as necessary or proper parties . . .", but it left the only claims tolled as being those in "malpractice" which, by definition, cannot be committed for purposes of the Act by persons or entities who are not physicians, dentists and health care facilities.

On balance, given the existing qualifying language preceding and following the language which was added by the legislature in 1985 to § 27-6-702, MCA; reading that section in the context of the entire Act; and given that the 1985 legislature made a number of other changes in the Act, it seems more appropriate to conclude that if the legislature *intended* to include *all parties* and *all claims* within the tolling provisions of the statute, that it would have made the necessary changes in other provisions of the Act to clearly effect that intention which we now find implicit in the legislative his-

tory. I have difficulty in reading into the statute language which broadens the types of claims tolled on the basis of divining legislative intent from a legislative history that is, at best, inconclusive.

It should be apparent that the statutory amendment suffers from some major drafting flaws which provide a trap for the unwary. Plaintiff understandably relied on what the statute, at quick perusal, seems to say. Similarly, Ethicon can hardly be faulted for reading the statute with a great deal more care than that with which the amendment was drafted. But for the District Court's and this Court's generous interpretation of the amended language to give effect to what is the perceived legislative intent behind the 1985 amendment, plaintiff would be out of court. The Court's interpretation of the statute saves plaintiff's case, but the language added to § 27-6-702, MCA, still remains ambiguous, confusing and out of context with other provisions of the Act.

Hopefully, § 27-6-702, MCA, will be further amended and the legislature's intent, whatever that actually is, will be made clearly evident in the language of the statute itself.

JAMES C. NELSON
Justice

Justice Karla M. Gray joins in the foregoing dissent.

KARLA M. GRAY
Justice

APPENDIX B

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

CAUSE NO. ADV-89-330

HELEN KIRWIN EISENMENGER, an Incapacitated Person by Veronica Eisenmenger, her Guardian and Conservator,

Plaintiff,

—VS—

ETHICON, INC., a New Jersey corporation, and JAMES E. MUNGAS, and MONTANA DEACONESS MEDICAL CENTER,

Defendants.

MEMORANDUM AND ORDER

The Court entered its Memorandum and Order granting the Motions for Summary Judgment of Defendants, Dr. Mungas and Montana Deaconess Medical Center, on February 13, 1992. Plaintiff submitted a Motion for Reconsideration and in the alternative, a Motion in Limine and Motion to Strike. The Motion for Reconsideration was denied and Dr. Mungas and Montana Deaconess Medical Center were dismissed from the case. The Motion in Limine and Motion to Strike are still under advisement. Also currently pending are Plaintiff's Motions for Sanctions and an Alternative Motion for Revision of Judgment. A hearing was held on May 4, 1992.

The district court has the inherent discretionary power to control discovery, which is based on the authority to control

trial administration. In controlling discovery the district court must regulate traffic to insure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage. *Massaro v. Dunham*, 184 Mont. 400, 603 P.2d 249, 251-252 (1979). The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.

As illustrated by *First Bank (NA)—Billings v. Heidema*, 219 Mont. 373, 375-376, 711 P.2d 1384 (1986), the Montana Supreme Court's attitude towards dilatory discovery tactics is unequivocal:

> In adopting a position that dilatory discovery actions are no longer to be dealt with leniently, we are in accord with the recent trend of cases intent upon punishing transgressors rather than patiently trying to encourage their co-operation . . . When litigants use willful delay, evasive responses, and disregard of court directives as part and parcel of their trial strategy they must suffer the consequences.

Furthermore, where it is determined that counsel or a party has acted willfully, or in bad faith in failing to comply with the rules of discovery or with court orders enforcing those rules, or in flagrant disregard of those rules or orders, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for the default. *Id.* at 376. It is a firm expectation of the Montana Supreme Court that the district court hold all parties to procedural standards which do not result in prejudice to other parties. *Id.*

In recent years, judicial indulgence in abuses of discovery has been increasingly replaced by a tougher, less tolerant attitude toward the parties who frustrate, rather than facilitate, discovery. *Owen v. F.A. Buttrey*, 192 Mont. 274, 277, 627 P.2d

1233 (1981). Hesitancy to impose sanctions has been attributed to a concern for a disposition of cases on their merits and a reluctance to punish parties without absolute assurance that non-compliance is not somehow justifiable. *Id.*

Unlike Rule 37(a), no mention is made in Rule 37(d) of a motion to compel. Indeed, a motion to compel is not necessary. *Dassori v. Roy Stanley Chevrolet Co.*, 224 Mont. 178, 180-181, 728 P.2d 430 (1986).

The spirit of the Montana Rules of Civil Procedure requires broad disclosure of knowledge of the case on the part of all the parties. *Smith v. Babcock*, 157 Mont. 81, 91, 482 P.2d 1014 (1971).

Defendant Ethicon makes the argument that M.R.Civ.P. Rule 37(d) applies only to situations where a party has completely failed to answer interrogatories. However, in *Vehrs v. Piquette*, 210 Mont. 386, 684 P.2d 476, 480 (1984), the district court granted the defendants' motion for an order limiting the plaintiff's proof because the plaintiff filed late answers to interrogatories, gave unverified answers, and served incomplete responses. It was held that the district court acted well within the confines of its discretion when it imposed the discovery sanctions at issue, and were well-tailored to the discovery abuse present. *Id.* Clearly, a complete failure to answer interrogatories or otherwise respond to discovery requests is not necessary in order to apply sanctions under M.R.Civ.P. Rule 37(d).

Plaintiff has propounded the following interrogatories.

By discovery responses dated April 28, 1988, Edward A. Block, manager of product services for Ethicon, Inc., and Maxon R. Davis, attorney for Ethicon, Inc., signed answers to discovery requests which contained the following:

INTERROGATORY NO. 110: In your "Sixth Defense' you indicate that persons or entities other than Ethicon, Inc., were careless, negligent or otherwise legally at fault for the damages alleged in plaintiff's complaint. As to this defense, please answer and identify:

a. Each such person or entity which or who was careless, negligent or otherwise legally at fault;

b. Each act or omission of each person or entity listed in your response to subparagraph "a" which you contend constitutes carelessness, negligence or legal fault;

c. Every person who has any information to support your contention that the person or entity identified in your response to subparagraph "a" was careless, negligent or otherwise legally at fault;

d. Every document or tangible evidence which supports your contention that the person(s) or entity(ies) listed in your answer to subparagraph "a" was (were) careless, negligent or otherwise legally at fault;

e. Identify the custodian of the document(s) or tangible(s) identified in your response to subparagraph "d".

RESPONSE TO INTERROGATORY NO. 110: Other than what is stated below, Ethicon has no present facts that persons or entities other than Ethicon, Inc., were careless, negligent or otherwise legally at fault for the damages alleged in plaintiff's complaint. For example, Ethicon knows that the suture in question was necessarily handled after it left Ethicon's control and before, during and subsequent to the closure of plaintiff's arteriotomy. Whether that handling was careless, negligent or otherwise legally at fault may be revealed during discovery, although the absence of the suture in question may preclude any definitive answer to this question.

INTERROGATORY NO. 114: In your "Eighth Defense" you indicate the plaintiff's injuries or damages were the result of the misuse of your product. As to this defense, please answer and identify:

. . . .

c. Identify each person who you contend misused the subject suture;

d. Set forth each act or omission which you contend constituted a misuse of the subject suture;

e. Every person who has any information to support your contention that there was a misuse of the subject suture;

f. Every document or tangible evidence which supports your contention that there was a misuse of the subject suture;

g. Identify the custodian of the document(s) or tangible(s) identified in your response to subparagraph 'f'.

RESPONSE TO INTERROGATORY NO. 114:

. . . .

c.–d. Ethicon does not know at this time who, if anyone, misused the suture in question. Ethicon does know that the suture in question was necessarily handled by persons within the operating room. Whether that handling constitutes misuse may be revealed during discovery, although the absence of the suture in question may preclude any definitive answer to this question.

e.–g. In the absence of the suture in question, the only persons with personal knowledge of possible misuse are the hospital personnel and physicians who participated in the surgeries. The only names known to Ethicon of these persons are contained in the medical records, copies of which are in the possession of plaintiff's attorneys.

On or about March 2, 1989, the following interrogatory responses were executed by Edward A. Block, manager of product services for Ethicon, Inc.

INTERROGATORY NO. 127: From your review of the evidence in this case, including the deposition testimony, do you contend that Dr. Mungas failed to take the necessary precautions in his use of the 6-0 Prolene* suture in the Helen K. Eisenmenger left carotid endarterectomy which was performed on October, 30, 1985?

RESPONSE TO INTERROGATORY NO. 127: Objection. Ethicon objects to this interrogatory on the grounds that it is vague and ambiguous in that the term "necessary precautions" is undefined. Without waiver, Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent surgeon mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon has not had an opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 131: From your review of the evidence in this case including the deposition testimony, do you contend that Dr. Mungas improperly tied the subject suture?

RESPONSE TO INTERROGATORY NO. 131: Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent surgeon mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon has not had an opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 139: From your review of the evidence in this case, including the testimony do you contend

that any act or omission of Dr. Mungas caused or contributed to the stroke which Helen K. Eisenmenger suffered between 11:00 p.m. November 1, 1985, and 8:00 a.m. November 2, 1985.

RESPONSE TO INTERROGATORY NO. 139: Objection. Ethicon objects to plaintiff's assumption of facts not in evidence. Without waiver, Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent employee mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 143: From your review of the evidence in this case, including the deposition testimony, do you contend that any act or omission on the part of any employee of the Montana Deaconess Medical Center caused or contributed to the stroke which Helen K. Eisenmenger suffered between 11:00 p.m. November 1, 1985, and 8:00 a.m. November 2, 1985.

RESPONSE TO INTERROGATORY NO. 143: Objection. Ethicon objects to plaintiff's assumption of facts not in evidence. Without waiver, Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of the proceedings and whether any employees of Montana Deaconess Medical Center, by any acts or omissions could have contributed to plaintiff's cerebral vascular incident and the role of those acts or omissions in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent employee mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon

has not had an opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 148: After review of the evidence including the deposition testimony given in this case, do you have any information that persons or entities other than Ethicon, Inc., were careless, negligent or otherwise legally at fault for the damages alleged in plaintiff's complaint?

RESPONSE TO INTERROGATORY NO. 148: Objection. Ethicon objects to this interrogatory on the grounds that it seeks a conclusion of law.

The following discovery responses dated June 29, 1990, were signed by Edward A. Block, manager of product services for Ethicon, Inc., and Maxon R. Davis, attorney for Defendant Ethicon, Inc.

INTERROGATORY NO. 127: From your review of the evidence in this case, including the deposition testimony, do you contend that Dr. Mungas failed to take the necessary precautions in his use of the 6-0 Prolene* suture in the Helen K. Eisenmenger left carotid endarterectomy which was performed on October 30, 1985?

RESPONSE TO INTERROGATORY NO. 127: Objection. Ethicon objects to this interrogatory on the grounds that it is vague and ambiguous in that the term "necessary precautions" is undefined. Without waiver, Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent surgeon mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon has not had an

opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 128A: If your answer to interrogatory no. 127 is affirmative, please set forth in detail each and every act or omission of Dr. Mungas which arguably or feasibly could have constituted a failure on his part to take the necessary precautions in his use of the subject suture.

RESPONSE TO INTERROGATORY NO. 128A: See response to Interrogatory No. 127.

INTERROGATORY NO. 129A: Do you contend that any failure of Dr. Mungas to take the proper precautions caused or contributed to the rupture of the subject suture?

RESPONSE TO INTERROGATORY NO. 129A: See response to Interrogatory No. 127.

INTERROGATORY NO. 131: From your review of the evidence in this case, including the deposition testimony, do you contend that Dr. Mungas improperly tied the subject suture?

RESPONSE TO INTERROGATORY NO. 131: Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of Dr. Mungas' handling of the suture and the role of that handling in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent surgeon mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon has not had an opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 132A: Identify any evidence which supports the position that Dr. Mungas improperly tied the subject suture and that this improper tying of the subject suture caused or contributed to the rupture of the subject suture?

RESPONSE TO INTERROGATORY NO. 132A: See response to Interrogatory No. 131.

INTERROGATORY NO. 133A: Please identify each expert or Ethicon employee who has reviewed the medical records of Helen K. Eisenmenger.

RESPONSE TO INTERROGATORY NO. 133A: Objection. Ethicon objects to this interrogatory on the grounds that it seeks information protected by the attorney work product privilege and is premature. Ethicon will disclose its experts as required at the appropriate time during this litigation.

INTERROGATORY NO. 134A: Please identify each expert or Ethicon employee who has reviewed the deposition testimony in this case.

RESPONSE TO INTERROGATORY NO. 134A: See response to Interrogatory No. 133A.

INTERROGATORY NO. 140A: Please set forth each act or omission of Dr. Mungas which arguably or reasonably could have caused or contributed to the stroke suffered by Helen K. Eisenmenger.

RESPONSE TO INTERROGATORY NO. 140A: See response to Interrogatory No. 139.

INTERROGATORY NO. 143A: From your review of the evidence in this case, including the deposition testimony, do you contend that an act or omission on the part of any employee of the Montana Deaconess Medical Center arguably or feasibly could have caused or contributed to the stroke which Helen K. Eisenmenger suffered between 11:00 p.m. November 1, 1985, and 8:00 a.m. November 2, 1985?

RESPONSE TO INTERROGATORY NO. 143A: Objection. Ethicon objects to plaintiff's assumption of facts not in evidence. Without waiver, Ethicon states that it is unable to respond. It was not present in the operating suite at the time of plaintiff's surgery and is therefore unable to comment on the specifics of the proceedings and whether any employees of Montana Deaconess Medical Center, by any acts or omissions could have contributed to plaintiff's cerebral vascular incident and the role of those acts or omissions in explaining the suture failure. However, this, in Ethicon's view, does not preclude inadvertent employee mishandling. Ethicon does not know, and may never know, what may have occurred. Ethicon has not had an opportunity to examine the subject suture material which is potentially the best evidence of what may have occurred. Ethicon does intend, however, to examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject.

INTERROGATORY NO. 147: Please set forth each factor which you contend substantially contributed to the post-operative stroke and respiratory complications suffered by Helen K. Eisenmenger.

RESPONSE TO INTERROGATORY NO. 147: Many factors may contribute including age, history, smoking, general physical condition, wound dehiscence, and post-operative complications among many other possible factors. Ethicon intends to examine these as well as all other possibilities and may, depending on the outcome, offer expert medical opinion on this subject.

The following discovery responses dated December 9, 1991, were signed by Edward A. Block, manager of product services for Ethicon, Inc., and Maxon R. Davis, attorney for Defendant Ethicon, Inc.

INTERROGATORY NO. 1: Is it your contention that Defendant James E. Mungas caused or contributed to the

injuries or damages allegedly suffered or sustained by the Plaintiff, as more fully described in her Complaint? If so, please set forth with particularity and in detail:

(a) each and every fact supporting this contention;

(b) the identity of any and all persons who could or would testify as to the truthfulness of this contention; and

(c) the identity of all writings, notes, letter, records, or any other document which could or would support the truthfulness of this contention.

RESPONSE TO INTERROGATORY NO. 1:

(a) Based on its investigation of the postoperative dehiscence experienced by plaintiff following her surgery in October 1985, Ethicon contends that such dehiscence was not due to any inherent property of PROLENE* suture material or to Ethicon's manufacturing procedures or labeling information, but rather to inadvertent suture damage or mishandling during its use, the precise nature of which is unavoidably unknown to Ethicon, by one of the individuals present in the operating room at the time of surgery, or to the surgical technique employed by one of those same individuals. Ethicon exercised no control over the suture after it left Ethicon's facility. Ethicon was not present during the time the suture was received, stored and handled by personnel from MDMC prior to its use during the surgery in question. Ethicon was not present in the operating room either during the initial operative procedure or the arteriotomy repair, when the suture was handled by operating room personnel, including Dr. Mungas, on multiple occasions and came into contact with a variety of surgical instruments. Because the suture utilized in the initial closure of the arteriotomy was thrown away by Mr. Mungas, MDMC employees or other operating room personnel, Ethicon was deprived of the opportunity to examine this crucial piece of evidence, from which the cause of the dehiscence could be obtained. Moreover, because Dr. Mungas, MDMC employees or other operating room personnel did not

keep track of the lot number from which the suture in question came, Ethicon was further deprived of the opportunity to demonstrate that such lot in particular met with Ethicon's manufacturing and quality control/quality assurance specifications in every respect. Thus, although Dr. Mungas was among those present in the operating room whose suture handling or surgical technique may have inadvertently caused or contributed to plaintiff's damages, or who, directly or indirectly, may have inadvertently mishandled, misused, altered or otherwise changed the suture material in question, Ethicon cannot say that Dr. Mungas was the sole individual responsible for the dehiscence. Nevertheless, no PROLENE* 6/0 suture material returned to Ethicon following an alleged postoperative dehiscence has failed to meet USP or Ethicon specifications, and Ethicon is of the opinion that the suture in this case was within USP and Ethicon specifications and has no present information or evidence to the contrary.

(b) All the individuals disclosed in the medical records or known to plaintiff and to Ethicon's co-defendants as well as those individuals disclosed in Ethicon's responses to the parties' discovery requests and/or the depositions of Ethicon's employees in this case.

(c) All written information produced or discovered in this case by all parties or available to the parties in the medical and scientific literature.

INTERROGATORY NO. 3: Please identify each and every expert witness whom you intend to call at the time of trial, who will testify that Defendant James E. Mungas misused, mishandled, altered or otherwise changed the suture material which is the subject of this litigation, and include the following information:

(a) the facts which substantiate the expert's claim of mishandling, misuse, altered or otherwise changing the suture material by James E. Mungas;

(b) the basis upon which your expert relies in identifying and detailing the alleged mishandling, misuse, altering or otherwise changing the suture material by James E. Mungas; and

(c) each and every written document upon which your expert relies in coming to his/her conclusion that James E. Mungas mishandled, misused, altered or otherwise changed the suture material which is the subject of this litigation.

RESPONSE TO INTERROGATORY NO. 3: See response to interrogatory No. 1 and Ethicon's Expert Witness Disclosures in this case dated August 30, September 3, November 17, 1991 or to be identified in the future by supplemental expert disclosure.

The following discovery responses dated December 9, 1991, were signed by Edward A. Block, manager of product services for Ethicon, Inc., and Maxon R. Davis, attorney for Defendant Ethicon, Inc.

INTERROGATORY NO. 6: Do you claim or intend to claim that any employee or agent of Montana Deaconess Medical Center was careless, negligent, or otherwise legally at fault with respect to the matters alleged in the plaintiff's complaint? If so, please set forth with specificity:

(a) all facts upon which you rely to support such contention;

(b) all persons, including last known addresses, who would testify in support of such contention;

(c) any documentation which you claim would support such contention.

RESPONSE TO INTERROGATORY NO. 6: See Response to Interrogatory No. 3.

The Court notes Defendant Ethicon filed its Expert Witness Disclosure List dated August 30, 1991 which follows below, in part:

EXPERT WITNESS DISCLOSURE OF DEFENDANT ETHICON, INC.

'Pursuant to this Court's May 29, 1991, Scheduling Order, defendant Ethicon, Inc. hereby discloses the following potential expert witnesses whom it may call at the trial of this matter:

(1) Cornelius Olcott IV, M.D., Palo Alto, California;

(2) John Kardos, PhD, St. Louis, Missouri;

(3) Any expert witness designated by any of the other parties;

(4) Ethicon, Inc. will call one or more of its own employees, all of whose names have been revealed in discovery. None of these employees has been retained for the purpose of testifying at the trial of this matter by this defendant; however they do possess expertise based upon their education and/or work-related experience in the manufacture of polypropylene suture material; and

(5) Defendant Ethicon, Inc. reserves the right to designate one or more additional experts, in keeping with the Court's May 29, 1991, Order calling for the sequential disclosure of experts, in the event that the plaintiff shall supplement her list of expert witnesses on or before September 1, 1991.'

Defendant Ethicon's Witness disclosure was never supplemented, or clarified.

Defendants Mungas and Montana Deaconess Medical Center propounded interrogatories to Defendant Ethicon directed to negligence, fault, and causation. Many of the interrogatories were substantially similar to those propounded by Plaintiff, as set out above.

Plaintiff took Dr. Cornelius Olcott's, Ethicon's expert, deposition on March 30, 1992. Dr. Olcott testified that the medical treatment rendered to Plaintiff by Dr. Mungas deviated in numerous particulars from the standard of care.

First, Dr. Olcott testified that the suturing technique used by Dr. Mungas was substandard, because it's fraught with the very problem that may have occurred in this case, that the suture line can come untied.

In addition, to the substandard suturing technique, Dr. Olcott listed several other acts or omissions of Dr. Mungas that were below the standard of care. He stated that the carotid endarterectomy was unnecessary and that the performance of the unnecessary surgery was the cause of Plaintiff's stroke and subsequent disability. Dr. Olcott testified that there was no indication for surgery; that the arteriogram did not show significant disease; and that there were just very vague symptoms that were not diagnostic of cerebrovascular disease.

Dr. Olcott pointed to several acts and omissions in the emergency repair surgery that were below the standard of care. He stated that Heparin, an anticoagulant, was not given until after the clamps were applied, leaving the possibility of clot formation, which was the reverse order from what one would normally do.

Dr. Olcott also stated that Dr. Mungas should have re-opened the arteriotomy completely and that failure to do so resulted in improper placement of the shunt. He also testified that it is a standard practice to use a patch when re-closing an arteriotomy that has been opened. Furthermore, he testified that there was inappropriate monitoring by Dr. Mungas, and that Plaintiff was progressively hypotensive, virtually going into shock and was not treated for that.

Dr. Olcott testified that it was sometime in 1988 that the case was first given to him for review; that he had basically the same factors before him then as now; that he discussed his opinions and conclusions with Charles F. Preuss, Ethicon's counsel, in 1988, and that he had conversations with Preuss over the ensuing three (3) or four (4) years.

Defendant Ethicon pursuant to M.R.Civ.P. Rule 26(b) claims that it was not required to disclose the identity or opinion of Dr. Olcott prior to August 31, 1991, arguing that he was a consultant, and covered under the work product doc-

trine, and therefore was discoverable only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Defendant Ethicon further argues that all the materials relied upon by Dr. Olcott were available to Plaintiff. Defendant Ethicon also implicitly argues that until August 30, 1991, Dr. Olcott was a expert who was not expected to be called to testify at trial, and as such, facts and opinions held by him were not discoverable absent a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts and opinions on the same subject by other means. It is unlikely that Dr. Olcott has not been expected to testify at trial for a considerable time period prior to the August 30, 1991. Many of the responses to the interrogatories as answered are incomplete and evasive. Defendant Ethicon through its counsel, Charles Preuss, has known of Dr. Olcott's opinion since 1988.

However, even if Defendant Ethicon is absolutely correct, Defendant Ethicon still had a duty to supplement its earlier responses seasonably. M.R.Civ.P. Rule 26(e), entitled Supplementation of responses, provides:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to testify, and the substance of the person's testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the

> response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Certainly without a doubt, a seasonable supplementation of the responses should have occurred prior to or at the pre-trial conference when the absence of evidence, i.e. expert testimony as to negligence of Dr. Mungas and Montana Deaconess Medical Center was discussed, or during the hearing and briefs on the motions for summary judgment, or in the motion for reconsideration. Ethicon did not ever supplement its responses even though it had a clear duty to do so. This amounts to a knowing concealment.

As a result of the responses to the interrogatories, several of which were served after the expert witness disclosure date, and none of which have ever been supplemented by Ethicon, Plaintiff abandoned its negligence claims against Dr. Mungas and Montana Deaconess Medical Center. Plaintiff then proceeded on a res ipsa theory. Defendant Ethicon claims Plaintiff voluntarily proceeded solely on the res ipsa loquitur, and relinquished its negligence theories based upon her own expert's testimony, and poor tactical judgment of her counsel; therefore, relieving Ethicon of the duty to supplement its responses. It cannot be reasonably said that Plaintiff would have chosen to rely solely on the doctrine of res ipsa loquitur had the interrogatories been supplemented as required.

Furthermore, it is an implicit and essential duty to answer interrogatories truthfully. Those interrogatories propounded and answered after August 31, 1991, were incorrect.

It is very doubtful, had the interrogatories been supplemented, or if those served after August 31, 1991 had been

answered correctly, that at least Defendant Dr. Mungas' Motion for Summary Judgment would have been made or granted. Dr. Mungas has essentially been out of the litigation since February 13, 1992 or at the latest, until Plaintiff's Motion for Reconsideration was denied on March 19, 1992. To grant Plaintiff's Motion for Revision of Judgment pursuant to M.R.Civ.P. Rule 54(b) would be unfairly prejudicial to Dr. Mungas.

This Court recognizes that sanctions pursuant to Rule 37(d) as listed in Rule 37(b) should be tailored to the discovery abuse. Plaintiff has suffered extreme prejudice due to Defendant Ethicon's willful, deliberate and unconscionable discovery abuses. Defendant Ethicon's original responses were often evasive and incomplete. Defendant Ethicon failed to seasonably supplement the interrogatories served before August 31, 1991. As to those interrogatories served after August 31, 1991, Defendant Ethicon's answers are patently incorrect. Defendant Ethicon's actions have been willful and in bad faith. Defendant Ethicon has indulged in unpardonable gamesmanship. Defendant Ethicon has violated the basic principles and spirit of the rules of procedure.

Plaintiff's Motion in Limine and Motion to Strike are well founded, but given the extent of Ethicon's abuse and the prejudice that has been caused, are not sufficiently severe.

The Court is mindful of the severity of a Rule 37(d) default judgment, however, due to Defendant Ethicon's abuses and the resulting prejudice, it is an appropriate penalty. Defendant Ethicon, when it committed its extensive discovery abuses, acted at its own peril. Therefore, Plaintiff's Motion to Impose Sanctions pursuant to Rule 37(d) as listed in Rule 37(b) should be granted and a default judgment on the issue of liability be entered against Defendant Ethicon.

Due to the severity of the sanctions that already should be imposed, M.R.Civ.P. Rule 11 sanctions are unnecessary.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions pursuant to M.R.Civ.P. Rule 37(d) as listed in M.R.Civ.P. Rule 37(b) is granted and a default judgment on the issue of liability be entered against Defendant Ethicon.

IT IS FURTHER ORDERED that Plaintiff's Motion for Revision of Judgment be denied.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine and Motion to Strike are hereby moot.

DATED this 11th day of May, 1992.

R.D. MCPHILLIPS

R.D. MCPHILLIPS, DISTRICT JUDGE
PRESIDING

APPENDIX C

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

No. ADV-89-330

HELEN KIRWIN EISENMENGER, an Incapacitated Person, by VERONICA EISENMENGER, her Guardian and Conservator,

Plaintiff,

–vs–

ETHICON, INC., a New Jersey Corporation, JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Defendants.

MEMORANDUM AND ORDER

Defendant Ethicon (herein referred to as Defendant) has brought two (2) motions before the Court; a Motion to Vacate the Default Judgment and a Motion in Limine concerning Hedonic Damages.

I.

SHOULD DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT BE GRANTED

Defendant argues that this Court's imposition of a default judgment is in violation of the due process provisions of the Fifth and Fourteenth Amendments to the Constitution. Several cases offer guidance to this Court.

The ruling in *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed 215 (1897), was that to punish for contempt by striking an answer from the files and condemning by default was a denial of due process of law and repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn and the right to which was at issue in the suit. *Hammond-Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 379 (1908).

The fundamental guaranty of due process is absolute and not merely relative, and the constitutional safeguards as to due process are at all times dominant and controlling where the Constitution is applicable. *Id.* at 379-380.

The situation in *Hammond* was specifically distinguished from that in *Hovey*. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982).

In *Hammond*, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. *Hammond-Packing Co. v. Arkansas,* 212 U.S. 322, 29 S.Ct. 370, 380 (1908).

The law of the United States and many of the states affords examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. *Id.* at 380.

However, Rule 37 should not be construed to authorize dismissal of the action because of non-compliance when it has been established that the non-compliance has been due to inability and not willfulness, bad faith or any fault of disobedient party. *Societe Internationale, Etc. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 1096, (1958).

Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with the rules of

discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for noncompliance. *G-K Properties v. Redevelopment Agency, Etc.*, 577 F.2d 645, 647 (9th Cir. 1978).

Although, in *Talbert v. Leighton*, 623 F.2d 585 (9th Cir. 1980), the district court entry of default was reserved, the reversal was due to facts which are distinguishable from the instant case. It was held that nothing in that opinion should deter courts from entering orders of dismissal if, after weighing the applicable law and policies, the facts of the case, and the alternatives to dismissal, it is determined in the exercise of sound discretion that dismissal is warranted. *Id.* at 587.

Due process limits the imposition of the severe sanctions of dismissal or default to extreme circumstances in which the deception relates to the matters in controversy and prevents their imposition merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case. *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985), citing *Wyle v. R.J. Reynold Industries Inc.*, 709 F. 2d 585, 589 (9th Cir. 1983).

This Court has previously found that Defendant's failure to provide seasonable supplementation was a knowing concealment. Original responses were often evasive and incomplete. As to the interrogatories served after August 31, 1991, the responses were patently incorrect. Defendant's actions were willful, deliberate, unconscionable, and in bad faith. Defendant has engaged in unpardonable gamesmanship and has violated the basic principles and spirit of the Rules of Procedure. Defendant's actions clearly interfered with the rightful decision of the case. The severity of the sanction imposed was recognized, and other sanctions were considered by this Court but were not found to be sufficient.

A hearing was held on Plaintiff's Motion for Rule 37 Sanctions in which Defendant appeared. Given the above extreme circumstances in which the deception related to the matters in controversy, no denial of due process occurred.

Therefore, Defendant's Motion to Vacate Default Judgment should be denied.

II.

SHOULD DEFENDANT'S MOTION IN LIMINE CONCERNING HEDONIC DAMAGES BE GRANTED

Plaintiff is entitled to have damages awarded her such as would fairly compensate her for all the detriment proximately caused by the injury suffered. One of the elements to be taken into consideration is the inability of Plaintiff to pursue her usual vocation. This element does not include compensation for loss of earning capacity. *Montague v. Hanson*, 38 Mont. 376, 386, 99 P. 1063 (1909).

Under Montana law, a plaintiff is entitled to recover from a negligent defendant for mental and physical pain and suffering. This does not require that any witness should express an opinion as to the amount of damages that would compensate for such an injury. The law requires only that when making an award for pain and suffering, the finder of fact exercises calm and reasonable judgment. The amount must of necessity rest in the sound discretion of the finder of fact. *Johnson v. U.S.*, 510 F.Supp. 1039, 1045 (D.Mont. 1981) citing *McNair v. Berger*, 92 Mont. 411, 15 P.2d 834 (1945).

In personal injury actions, there is no measuring stick by which to determine the amount of damages to be awarded for pain and suffering other that the intelligence of a fair and impartial trier of fact governed by a sense of justice. Each case must of necessity depend upon its own peculiar facts. *Id.* citing *Pfau v. Stokke*, 110 Mont. 471, 103 P.2d 673.

Under Montana law, a plaintiff who has been permanently injured as a result of the negligence of the defendant may recover such sum as will compensate her reasonably for the destruction of her capacity to pursue an established course of life as an element of damages distinct from plaintiff's loss of earning capacity. *Johnson v. U.S.*, 510 F. Supp 1039, 1045 (D.Mont. 1981), citing to *Montague v. Hanson*, 38 Mont. 376, 386, 99 P. 1063 (1909).

Hedonic damages are based on the catastrophic Loss in the Pleasure of Life (herein LPL) in the following life areas:

1. *Practical functioning.* This refers to the extent a person's activity in daily living has been affected. Included in this area are any activities a person typically engages in as an integrai part of daily life, such as reading, grooming, dressing, eating, sleeping, shopping, traveling, doing housework, and parenting.

2. *Emotional/psychological functioning.* This refers to a person's ability to live on a daily basis free from any debilitating emotional problems that diminish capacity to enjoy life and comprise one's sense of self-worth, dignity, and integrity.

3. *Social functioning.* This refers to a person's capacity to derive pleasure from interacting with other people. Examples include family interactions, athletic activities, social events, hobbies, and any other interpersonal interactions.

4. *Occupational functioning.* This refers to a person's ability to engage in a career/vocation of one's choice and to derive pleasure from one's occupational identity independent of any monetary compensation.

Essentially the losses described above fall within the traditional pain and suffering damage category, and the loss of established course of life damage category. To allow testimony as to hedonic damages and the LPL scale would unjustly encourage a double recovery. The probative value of such testimony is far outweighed by the potential prejudice. Therefore, Defendant's Motion in Limine concerning Hedonic Damages should be granted.

ORDER

IT IS HEREBY ORDERED that Defendant's Motion to Vacate the Default Judgment be and the same is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion in Limine concerning Hedonic Damages be and the same is hereby granted.

Dated this 8th day of October, 1992

/s/ R. D. MCPHILLIPS

R. D. MCPHILLIPS, DISTRICT JUDGE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 93-034

Filed April 14, 1994

HELEN KIRWIN EISENMENGER, an Incapacitated Person by Veronica Eisenmenger, her Guardian and Conservator,

Plaintiff, Respondent, and Cross-Appellant,

v.

ETHICON, INC., a New Jersey corporation,

Defendant and Appellant,

and

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Defendants and Cross-Respondents.

ORDER

The petition for rehearing is denied.

DATED this 14th day of April, 1994.

J. A. TURNAGE
Chief Justice

JOHN CONWAY HARRISON

KARLA M. GRAY

WILLIAM E. HUNT, SR.

[ILLEGIBLE]

[ILLEGIBLE]

[ILLEGIBLE]
Justices

(2)

Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

No. 94-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

v.

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent.

– and –

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments to the U.S. Constitution bar a state court from entering a default judgment against a defendant, pursuant to state procedural rules, as a sanction for years of willful, bad faith obstruction of the discovery process which severely prejudiced and directly interfered with obtaining correct decision in the case?

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No. 94-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

v.

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent.

– and –

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Helen Kirwin Eisenmenger, an incapacitated person, by Veronica Eisenmenger, her guardian and conservator, (hereafter "Eisenmenger") submits this brief

in opposition to Ethicon's Petition for Certiorari. Eisenmenger received the Ethicon petition on July 15, 1994, and has filed this brief in opposition within the thirty-day period set forth in Rule 15.2 of the Rules of the Supreme Court. Eisenmenger agrees that this court has jurisdiction under 28 U.S.C. §1257(a).

RULE INVOLVED

Rule 10 of the Rules of the Supreme Court:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

INTRODUCTION

Ethicon asks this Court to interfere in a state trial court's discretionary power to sanction Ethicon for its admitted strategy of concealing critical evidence from legitimate discovery over a period of more than three and one-half years. Ethicon's discovery abuse was not exposed

until trial was imminent and after Eisenmenger and the trial court had made critical decisions based upon the assumption that Ethicon had responded truthfully to numerous discovery requests. Ethicon's willful, bad faith conduct therefore resulted in irreparable prejudice to Eisenmenger and to the court's ability to reach a correct decision of the case.

The trial court reviewed more than twenty specific instances of discovery abuse. Intimately familiar with the case and the course of discovery, the trial court found Ethicon to have engaged in "knowing concealment" in violation of its "implicit and essential duty to answer interrogatories truthfully". (p. 43a)[1] It found responses to discovery that were "evasive and incomplete" and other responses that "were patently incorrect". (p. 44a) It determined that Ethicon's actions were "willful, deliberate, unconscionable and in bad faith" (p. 48a) and that Ethicon had "indulged in unpardonable gamesmanship" and had "violated the basic principles and spirit of the rules of procedure." (p. 44a) The court found that Ethicon's discovery abuse had prejudiced its ability to reach a just decision on the merits because it was "very doubtful" that Mungas' Motion for Summary Judgment "would have been made or granted" had the evidence concealed by Ethicon been disclosed through discovery. (p. 43a-44a) Similarly, the court noted that Eisenmenger "suffered extreme prejudice" in that it could not "be reasonably said" that she would have made certain pretrial tactical decisions but for Ethicon's concealments. (p. 44a) In considering the severity of its sanction, the

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[1]This reference and similar references hereafter are to Appendices A, B and C submitted with Ethicon's Petition for Writ of Certiorari.

trial court expressly considered and rejected alternative sanctions and determined that they were not sufficiently severe "given the extent of Ethicon's abuse and the prejudice that has been caused". (p. 44a)[2]

The Montana Supreme Court's condemnation of Ethicon's conduct was just as harsh. After reviewing various examples of Ethicon's discovery responses, the court held that this was not a situation where the "wrong" questions were asked in discovery and observed that "there was nothing more which could have been asked in order to elicit [the evidence] from Ethicon. . . ." (p. 15a) Concurring with the trial court, the Montana Supreme Court found Ethicon's conduct to demonstrate "intolerable gamesmanship and obstructiveness" and that Ethicon was "playing loose and fast with the rules of discovery". (p. 15a) Like the trial court, which observed that a party engaging in willful, bad faith discovery abuse acts "at its peril", (p. 44a) the Montana Supreme Court observed that such discovery abuse was the "equivalent to playing Russian roulette with only one chamber empty – it cannot be relied upon to lead to a favorable result." (p. 16a) The Montana Supreme Court concurred with the trial court that Ethicon's failure to respond to discovery requests was "willful and in bad faith". (p. 16a)

Contrary to Ethicon's assertion, neither court ignored due process considerations of fairness. In its Memorandum and Order dated October 8, 1992, the trial court acknowledged that due process limited the severe sanction of default judgment to "extreme circumstances in

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[2]Citing *Fjelstad v. American Honda*, 762 F.2d 1334, 1338 (9th Cir. 1985) and *Wyle v. R.J. Reynolds Corp.*, 709 F.2d 585, 589 (9th Cir. 1983).

which the deception relates to the matters in controversy" and prevents their imposition for infractions that do not "threaten to interfere with the rightful decision of the case."[3] (p. 48a) Being in the best position to know, the trial court determined that Ethicon's action "clearly interfered with the rightful decision of the case". (p. 48a)

The Montana Supreme Court was likewise concerned with due process considerations of fairness. Citing *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958), it held that "due process requires that default may not be imposed absent willfulness, bad faith, or fault." However, it concurred that Ethicon's discovery abuses "directly interfered with the correct decision in the case" and observed that the "concealed evidence clearly went to the heart of Ethicon's defense to Eisenmenger's claim." (p. 15a) Thus, by the time Ethicon's deceptions were discovered by the trial court, "severe prejudice had already occurred to Eisenmenger, and the court had few options for appropriate and meaningful sanctions against Ethicon." (p. 15a)

The above is essential background to Ethicon's Petition for Certiorari. Ethicon's glib characterizations of its discovery abuses are a transparent attempt to persuade this

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[3] Based upon some out of context remarks at the damage trial on August 3, 1992, Ethicon contends that the trial judge had second thoughts about the severity of the sanction. If so, such sentiments were short-lived. *After* making the comments cited by Ethicon, the judge conducted a hearing on Ethicon's Motion to Vacate the Default Judgment and issued a Memorandum and Order dated October 8, 1992, in which he discussed due process considerations and reiterated, in even stronger terms, his finding that Ethicon's actions were willful and in bad faith, and that other sanctions had been considered, "but were not found to be sufficient." (p. 48a)

Court to substitute itself for the trial court as the fact finder. The issue before this Court is not whether Ethicon's conduct was "willful or in bad faith". That issue has been determined conclusively by the state courts. The issue before this Court is whether the state court's imposition of a default judgment on liability for willful, bad faith conduct during discovery violates due process. In its present posture, Ethicon's petition is the civil equivalent of a sentence reduction motion. Distilled to its essence, Ethicon's argument for the writ is that the trial court abused its discretion in finding discovery misconduct of the most serious nature. Thus, the real question Ethicon puts to this Court is nothing more than a thinly veiled evidentiary sufficiency argument and is ill suited for the exercise of certiorari jurisdiction.

STATEMENT OF THE CASE

The Factual Background

On October 30, 1985, Helen Eisenmenger underwent surgery by Dr. James Mungas (hereafter "Mungas") to remove plaque in her left carotid artery. The surgery was performd at the Montana Deaconess Medical Center (hereafter "MDMC").

The incision in the artery was closed with Prolene suture. Prolene is the trade name of a suture manufactured, packaged and distributed by Ethicon, Inc.

Two days later, just after Eisenmenger was observed to be "resting quietly" in her hospital bed, blood suddenly spurted from the surgical would in Eisenmenger's neck. Eisenmenger became unresponsive within minutes.

Eisenmenger was rushed to emergency surgery where Mungas, upon uncovering the artery, observed that the

incision in the artery had separated because the Prolene suture had broken approximately midway between the knots on each end of the incision. (EA 289-290)[4] As a result of the breakage of the suture, Eisenmenger suffered a stroke rendering her a severely disabled hemiplegic, who requires 24-hour a day attendant care. (EA 297)

During discovery, Ethicon admitted that in the absence of abnormal arterial forces, post-operative suture breakage occurs spontaneously *only* if its tensile strength has been comprised so that it is too weak to resist normal arterial pressures. (EA 83-84) There was no evidence that the suture was subjected to abnormal arterial forces in the two days before the suture broke. Thus, the tensile strength of the suture was comprised at some time before it was introduced into the artery.

The sterilized suture is not removed from its protective packaging until it is used by the surgeon in the operating room. Thus, in the absence of evidence that the suture was subjected to abnormal arterial forces, there were only two possible causes for breakage of the suture: (1) defect in the suture occurring during the manufacturing and packaging process or (2) damage inflicted by the surgeon during unpackaging and suturing. (EA 302-303) Eisenmenger therefore commenced an action for products liability and medical malpractice against Ethicon, Inc., Mungas and MDMC.

Sometime in 1988, and after becoming aware of Eisenmenger's claim, Ethicon's counsel gave Eisenmenger's medical records to Dr. Cornelius Olcott IV (hereafter "Olcott") for review. In the opinion of Olcott, Mungas erred as follows:

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[4]Citations designated "EA" are to the Eisenmenger Appendix that was filed in the Montana Supreme Court.

1. Mungas failed to refer Eisenmenger to a neurologist following her arteriogram. (EA 175)

2. Mungas should not have performed surgery on the same day on which the arteriogram was performed. (EA 172)

3. Mungas should not have performed a carotid endarterectomy in any event. (EA 172)

4. Mungas employed a substandard suturing technique. (EA 169)

5. Eisenmenger's wound opened not because of suture breakage but because the suture came untied at the proximal knot, as a result of Mungas' substandard suturing technique. (EA 170)

6. Mungas erred in not completely reopening the arteriotomy in preparation for the second surgery. (EA 172)

7. Mungas erred in the timing of his administration of an anti-coagulant. (EA 172)

8. Mungas erred in closing the second arteriotomy with suture rather than patch. (EA 173)

9. Mungas inappropriately monitored Eisenmenger following her second surgery by failing to use a Swan-Ganz catheter. (EA 173-175)

Olcott formed these opinions in 1988; discussed them with Ethicon's counsel at that time; and had other conversations with Ethicon's counsel concerning his opinions over the "ensuing three or four years". (EA 173-174)

Seeking to avoid liability for product defect and in order to blame Mungas, Ethicon, in its answer to the Complaint, asserted four affirmative defenses alleging

that the suture breakage occurred by reason of the "carelessness, negligence or legal fault" of "persons or entities other than this answering defendant"; by reason of "one or more independent intervening causes"; by reason of "misuse of this defendant's product"; and by reason of "alteration or change of the material after it left defendant's custody and control".

There being only two explanations for the breakage of the suture, one attributable to Ethicon and the other to Mungas or MDMC, the handling and use of the suture by Mungas was a central issue of the case.

The Discovery

Discovery commenced in 1988 and continued over several years, during which Eisenmenger and Mungas, on four occasions,[5] propounded interrogatories to Ethicon requesting that it disclose all information that Mungas mishandled, altered or misused the suture or in any way caused or contributed to Eisenmenger's injuries and damages. Facts, opinion, causation evidence and identities of persons with such knowledge, were sought. Ethicon's responses were always similar. The information sought was not within Ethicon's knowledge, but was "within the knowledge" of Mungas. (EA 117-118) Ethicon had "no present facts" that other persons were careless or negligent. (EA 87-88) Ethicon "does not know at this time" who if anyone, misused the suture. (EA 89-90) Ethicon is "unable to respond" because Ethicon "does not know, and may never know, what . . . occurred." (EA 96-99, 109, 112) Ethicon is "unable to respond" to the question whether

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[5] Eisenmenger interrogatories are dated 4/28/88, 3/2/89 and 6/29/90; Mungas interrogatories, 12/9/91.

any act or omission by Mungas caused Eisenmenger's stroke. (EA 100-103, 113-115)

Although Ethicon was asked to identify all persons with information supporting its responses, Olcott was not mentioned for more than three and one-half years after he had been retained by Ethicon. When Olcott's name was finally disclosed on August 31, 1991,[6] additional interrogatories were immediately (within three days) propounded to Ethicon that were again directed specifically at determining all evidence possessed by Ethicon suggesting that any conduct of Mungas was the cause of Eisenmenger's injuries. Ethicon persisted in concealing the evidence to be offered by Olcott and advised that it did not know of any individuals who would or could testify that Mungas caused or contributed to Eisenmenger's injuries other than "those individuals disclosed in the medical records". (EA 121-123) Simi-

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[6]Ethicon asserts that the parties disclosed the identity of experts in the same manner. This assertion avoids the issue. The issue was not the *identity* of the experts, but the concealment of the opinion evidence of the expert in response to discovery that was clearly intended to elicit such information. Ethicon's assertion is a transparent attempt to divert the Court's attention from the issue before it. The Rule 26(b)(4) interrogatories propounded by Ethicon were answered by Eisenmenger fully and completely and on a timely basis. (EA 142-162) Eisenmenger made both of her liability experts available for early deposition. Prior to depositions curricula vitae and reports were provided to opposing counsel. Eisenmenger permitted the deposition of one expert (Hetzel), which had already lasted eight hours, to be continued to a future date in the event he might modify his opinions based on newly discovered evidence. When opinion evidence on damages was acquired by Eisenmenger, her discovery was promptly supplemented, including complete curricula vitae and full written reports of each damage expert. She permitted Ethicon to depose the damage experts at a time convenient to Ethicon. Most importantly, Eisenmenger *never* failed to provide full, complete and correct answers to written discovery propounded by Ethicon, including *all* information that was then available to her.

larly, the "precise nature" of mishandling by Mungas was "unavoidably unknown" to Ethicon. (EA 121-122)

Ethicon never supplemented its answers to any of the interrogatories which sought information regarding any conduct of Mungas that may have caused Eisenmenger's injuries or with respect to expert opinions regarding Mungas' conduct.

The Hearings and the Prejudice to Eisenmenger and the Court

At a pretrial conference on November 27, 1991, the court and counsel specifically discussed whether there was any evidence that the conduct of Mungas was the cause of Eisenmenger's injuries. Because none of the surgical team, including Mungas, implicated any other team member, and because Ethicon had repeatedly indicated it had no evidence implicating Mungas, Eisenmenger limited her negligence theories against Mungas to the doctrine of *res ipsa loquitur.* At no time during the conference did Ethicon reveal the opinion evidence of its expert, Olcott, although it had known of his accusations against Mungas for more than three years.

On January 6, 1992, Mungas moved for summary judgment on the ground that there was no evidence of his negligence and that the doctrine of *res ipsa loquitur* did not apply under the circumstances of the case.

The summary judgment motion was heard on January 28, 1992. Ethicon still made no mention of Olcott's opinions. Believing that there was no evidence of Mungas' fault, the court granted summary judgment to Mungas on February 13, 1992.

Ethicon permitted Olcott's deposition to be taken on March 30, 1992.[7] Olcott testified to the nine errors, *supra,* and admitted that he had advised Ethicon of his opinions more than three and one-half years before the deposition. (EA 173-174)

Upon receiving the transcript of Olcott's testimony, Eisenmenger filed a motion for sanctions because Ethicon, by failing to disclose the opinion evidence of Olcott, had concealed evidence and responded untruthfully to discovery relating to issues that were critical to Ethicon's affirmative defenses, to the court's decision on summary judgment and to tactical decisions by Eisenmenger.

On May 11, 1992, State District Court Judge R.D. McPhillips granted Eisenmenger a default judgment on the issue of liability as a sanction for willful, bad faith discovery abuse by Defendant Ethicon, Inc. over a period of more than three years. (Pet. for Writ, App. B) Trial on damages was conducted from August 3-6, 1992. On October 8, 1992, the trial court issued its Memorandum and Order denying Ethicon's Motion to Vacate Default Judgment. (Pet. for Writ, App. C) On March 24, 1994, the Montana Supreme Court affirmed the decision of the state trial court. (Pet. for Writ, App. A) Ethicon, Inc.'s Petition for Writ of Certiorari presents the question of whether there are "special and important reasons" why

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[7]**Under Rule 26(b)(4) of the Montana Rules of Civil Procedure, a deposition of an opposing party's expert is permissive. Ethicon did not permit Olcott to be deposed until the last two days of discovery, March 30-31, 1992. Relying on the truthfulness of Ethicon's discovery responses, to the effect that Ethicon had no evidence of any conduct by Mungas that could have caused her injury, Eisenmenger had no reason to seek a court order for an earlier deposition.**

the Supreme Court should exercise its discretion to review the decision of the Montana Supreme Court on Writ of Certiorari.

SUMMARY OF ARGUMENT

Ethicon is not entitled to *de novo* review of the trial court's finding of willfulness and bad faith. The issue is not whether the reviewing court would, as an original matter, have applied the same sanction, the issue is whether the trial court abused its discretion. Default judgment on liability is not an abuse of discretion for discovery abuse that is willful and in bad faith and does not violate due process if it is "just" and relates to the particular claim at issue in the discovery. There are no special or important reasons why the Supreme Court should exercise its discretion to grant certiorari because the federal question urged by Ethicon is settled by decisions of this Court and there is no split among the circuits or among the highest state courts.

THIS CASE IS NOT APPROPRIATE FOR THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION

Ethicon persists in its characterization of its discovery responses as merely "evasive" or "incomplete". This fanciful spin glosses over the wholesale evasion of discovery which so troubled the lower courts. Ethicon does not contend that it was unable to disclose the evidence. Nor does it dispute that the discovery responses were, on their face, aimed directly at the evidence of Mungas' conduct that may have caused or contributed to Eisenmenger's injuries; that it had evidence of such conduct for more than three and one-half years; that the evidence was requested in one form or another in more than twenty

interrogatories and on at least four different occasions; and that on at least two occasions Ethicon failed to disclose the evidence at hearings where the conduct of Mungas was at issue.[8] Nor can it seriously dispute the prejudice to Eisenmenger and to the court's decision on Mungas' Motion for Summary Judgment. The trial court presided over the hearing at which Eisenmenger, in reliance upon Ethicon's discovery responses that it had no evidence of Mungas' negligence, relinquished her negligence claims (except for *res ipsa loquitur*) against Mungas. The court noted that, "it cannot be reasonably said" that Eisenmenger would have made such a tactical decision but for Ethicon's concealment.

The trial court also presided over the hearing on Mungas' Motion for Summary Judgment during which

---

[8]Ethicon's admission of its strategy to conceal evidence of conduct of Mungas that may have caused Eisenmenger's injuries came in an extraordinary document entitled Supplemental Brief of Defendant/Appellant Ethicon, Inc. dated October 6, 1993, and filed with the Montana Supreme Court. Ethicon observed that the case involved Eisenmenger, on the one side; a well-respected Montana surgeon and a local Montana hospital on another side; and "on the third side of this triangle . . . an out-of-state subsidiary of one of the country's largest health care companies." According to Ethicon, "No sensible attorney would look forward to arguing that Mrs. Eisenmenger's condition was entirely the fault of the local doctor and that any compensation should come from him. . . ." Ethicon, however, acknowledged that it intended to use its evidence of Mungas' conduct on the issue of causation. To further this strategy (to get Mungas out of the case and then point at the "empty chair"), Ethicon concluded that "so long as Dr. Mungas was in the case" Ethicon could conceal its causation evidence, even though the discovery clearly called for all causation evidence involving Mungas, as well as all other types of evidence. In short, Ethicon took the incredible position that it could willfully conceal evidence that was harmful to its trial strategy because it did not have the obligation to prove Eisenmenger's case against Mungas.

Ethicon continued to conceal its evidence. The trial court subsequently granted Mungas' motion in the absence of direct evidence of Mungas' negligence and on the ground that *res ipsa loquitur* did not apply. After Ethicon's discovery abuse had been exposed, the trial court found that it was "very doubtful" that had Ethicon answered its discovery correctly, that Mungas' motion "would have been made or granted".

The trial judge was in the best position to determine the prejudicial effect of Ethicon's conduct on Eisenmenger. He certainly was in the best position to determine the prejudicial effect of the conduct on his own decisions. He carefully weighed the extremity of Ethicon's conduct against the prejudice to Eisenmenger and to a correct decision of the case. He was in the best position to determine whether a sanction should be imposed, and the severity of the sanction.

A. The federal question urged by Ethicon is settled by the decisions of this Court.

Ethicon cites *Societe Internationale,* for the proposition that Rule 37 sanctions may involve due process considerations. Eisenmenger concedes this general proposition. *Societe Internationale,* however, offers scant comfort to Ethicon. The court in *Societe Internationale,* unlike the present case, specifically found that the plaintiff's failure to comply with pretrial production of documents was due to "inability" beyond its control, rather than to "willfulness, bad faith, or any fault of petitioner." *Id.* at 212. Further, the court in *Societe Internationale* found that plaintiff's inability to produce certain documents during discovery was in spite of plaintiff's "good faith efforts". In the present case, Ethicon

does not (and cannot) assert inability to respond to the discovery. Ethicon is not entitled to *de novo* consideration by this Court of the trial court's finding of willfulness and bad faith. As a reviewing court, this Court accepts the trial court's findings as conclusive. *Id.* at 209. As such, the sanction applied to Ethicon's discovery abuse falls squarely within the rule of *Societe Internationale.*

The rule which applies to willful, bad faith conduct was further enunciated in *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976). Citing *Societe Internationale,* the court in *National Hockey League* upheld the district court's exercise of its discretion in dismissing an action as a sanction for discovery abuse that the district court had characterized as "willful" and in "bad faith".

Insurance Corporation of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982) is consistent with *National Hockey League.* The district court ordered that defendants respond to discovery related to the issue of personal jurisdiction. The defendants refused to respond on the ground that the court lacked jurisdiction over them and that they were therefore not required to follow its orders. The district court therefore sanctioned their refusal to respond by imposing a finding of personal jurisdiction. Defendants argued that the district court could not impose personal jurisdiction as a matter of law because they had a *right* to deny personal jurisdiction that could not be abrogated by the district court. This Court rejected defendants' argument and upheld the sanction on the grounds of both *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909) and *National Hockey League.*

> Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . .
>
> The actions of the defendant may amount to a legal submission to the jurisdiction of the court whether voluntary or not.
>
> The expression of legal rights is often subject to certain procedural rules: the failure to follow those rules may well result in curtailment of the rights.

456 U.S. 694, 703-705.

The essence of the rule in *Insurance Corporation of Ireland* is the same as the rule in *National Hockey League* – a litigant may waive its rights, voluntarily or involuntarily, by its conduct.[9]

A sanction that results in a constructive waiver is the "same thing" as the "invocation of a legal presumption" as occurred in *Hammond*. *Insurance Corporation of Ireland*, 456 U.S. at 694, 706. In *Hammond*, the court preserved due process by upholding the presumption that the refusal to produce evidence was "an admission of the want of merit in the asserted defense." 212 U.S. at 351. Ethicon argues that it may purge itself of the consequences of the *Hammond* presumption by coming forward with the concealed evidence after having obtained the advantage of its nondisclosure. This argument is nothing more than a disguised request for *de novo* review of the merits of the concealed defenses – the very defenses that are presumed to be without merit under *Hammond*. In short, Ethicon's interpretation

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[9] Arguably, *Insurance Corporation of Ireland* expands *National Hockey League* to instances in which a litigant's conduct in refusing to participate in discovery is deliberate, but not necessarily willful or in bad faith.

renders the *Hammond* presumption meaningless, and Ethicon cites no authority for its novel position.

The trial court's discretion in selecting the appropriate sanction is limited only by the requirement that the sanction be "just" and that it relate to the particular claim at issue. *Insurance Corporation of Ireland,* 456 U.S. 694, 707; *Wyle,* 709 F.2d 585, 591. Clearly Ethicon's discovery abuse related directly to the central issue of the case – whether the suture breakage occurred from product defect or from conduct of Mungas. The discovery was critical both to Eisenmenger's claim against Mungas and to Ethicon's affirmative defenses to Eisenmenger's claim. In the absence of the evidence against Mungas, all that remained to explain the suture breakage was product defect for which there was ample supporting evidence and for which Ethicon was legally responsible.[10] The presumption from Ethicon's failure to pro-

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[10]The evidence of product defect was substantial: (1) The suture broke midline, rather than at the knot. Ethicon testing indicated that if stress is applied to a *non*-defective suture, the suture will break *at the knot,* rather than midline, because the weakest point is at the knot (EA 208, 224-226); (2) there was no evidence that Eisenmenger did anything to cause the suture failure, as she was "resting peacefully" when the rupture occurred (EA 260-271); (3) Mungas and all other operating room personnel denied having done or observing anything that damaged or compromised the suture; (4) Ethicon had reported numerous other instances of post-operative, *in vivos* failures of Prolene suture when used in carotid endarterectomies (EA 355-356); (5) in the five-year period immediately preceding Eisenmenger's operation, Ethicon noted an alarming increase in reports of Prolene suture breakage of the size suture used in Eisenmenger's operation (EA 367-375); (6) Ethicon's manufacturing process results in the production of vast quantities of defective suture (EA 234-235, 377); (7) Ethicon's visual and tactile quality control procedures are only 80% effective in detecting defective suture (EA 298-301); and (8) Ethicon's other mechanized

[footnote continued]

duce the evidence was that its affirmative defenses implicating Mungas were without merit such that the only explanation for the suture failure was product defect – a presumption wholly consistent with the sanction imposed.

The sanction was also "just". Ethicon admitted that it purposefully adopted a strategy of concealment to get Mungas dismissed from the case before using its evidence of Mungas' conduct on the issue of causation. To advance this strategy, Ethicon responded untruthfully, evasively and incompletely to more than twenty interrogatories that were intended to elicit Ethicon's evidence regarding Mungas' conduct, including both opinion and causation evidence. Ethicon failed to disclose the evidence at hearings where Mungas' conduct was at issue and where it was obvious that the concealed evidence was critical to tactical decisions of Eisenmenger and to the court's decision on pending Motions for Summary Judgment. Ethicon's strategy worked well. By the time the concealed evidence was discovered, Eisenmenger had relinquished negligence claims against Mungas in reliance upon Ethicon's repeated assertions that it had no evidence to suggest fault on the part of Mungas, and the court had granted Mungas' Motion for Summary Judgment. Eisenmenger was entitled to rely on the truthfulness of Ethicon's responses and therefore had no reason to move to compel.[11] Ethicon's concealments were not disclosed

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quality control procedures allow up to 38 out of 10,000 defective suture strands to escape detection. Thus, Ethicon's quality control procedures introduce defective suture into the stream of commerce.

[11]The unique and insidious feature of discovery responses that are untruthful, rather than merely evasive or incomplete, is

[footnote continued]

until after the prejudice had already been wrought. Accordingly, any lesser sanctions would have resulted in Ethicon profiting from its discovery abuse at the expense of Eisenmenger. The trial court was not obliged to try lesser sanctions when they would have been to no avail because the prejudice had already occurred. The course of behavior of Ethicon and the severity of the prejudice demonstrate the "justice" of the trial court's Order.

B. There is no split among the circuits or among the highest state courts.

Ethicon asserts that the Fifth and Ninth Circuits, and three state courts, apply a rule that is different from other circuits and other state courts. Ethicon's assertion is strained and finds differences where none exist. The Ninth Circuit and the Fifth Circuit, like the other circuits, and the various state courts that have considered the issue, have no difficulty in applying the rule enunciated in *National Hockey League* and *Societe Internationale* in appropriate cases. They have done so without having to reconcile "differences" between *National Hockey League* and *Insurance Corporation of Ireland* imagined by Ethicon.

To make its point, Ethicon misreads the holding in *Securities and Exchange Commission v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982). In *Seaboard* Spellman was in contempt of court for refusal to pay a fine levied by the court for Spellman's failure to attend a deposition.

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that the innocent party who relies upon the truthfulness of the responses has no reason to move to compel. Thus the trial court has no opportunity to order discovery or to issue warnings unless and until the deception is discovered, which, in this case, was not until *after* the prejudice had occurred.

As punishment for the contempt of court, the court purported, under Rule 37, to strike Spellman's answer and enter a default judgment against him. The Ninth Circuit, under *Hovey v. Elliott,* 167 U.S. 409 (1897), set the sanction aside since it did not involve discovery abuse but merely punished a contempt. Nowhere does the court in *Seaboard* address the issue raised here, namely, the power to grant default judgment as a sanction for willful, bad faith discovery abuse.

Ninth Circuit cases cited by Ethicon actually support Eisenmenger's position. Thus, in *Munoz-Santana v. U.S. Immigration and Naturalization Serv.,* 742 F.2d 561 (9th Cir. 1984) the Ninth Circuit, citing *Societe Internationale,* found that a default judgment was not warranted "in the absence of willfulness, bad faith, or fault" – the precise rule established in *National Hockey League.* 742 F.2d at 564. Similarly, in *United States v. Sumitomo Marine,* 617 F.2d 1365 (9th Cir. 1980), the Ninth Circuit specifically addressed the due process issue. In affirming a sanction for discovery abuse, the circuit court cited *Societe Internationale* and *National Hockey League* and noted that due process was not violated by the sanction of dismissal where the litigant's conduct has been willful or in bad faith. 617 F.2d at 1369.

Nor does *Fjelstad v. American Honda,* 762 F.2d 1334 (9th Cir. 1985) stand for the proposition asserted by Ethicon. In *Fjelstad,* the court expressly distinguished the facts from cases in which a litigant made "knowingly false denials and deliberate efforts to frustrate the production of documents relating to a critical issue" and found that the conduct of the defendant did not deceive the court about the issues in controversy or threaten to interfere with the correct decision of the case. 762 F.2d

at 1338. It further noted that the district court did not find that the defendant's objections to the discovery were "meritless or that they were imposed in bad faith". The court then went on to discuss the severity of the sanction and expressly found that "fairness demands" that the sanction of default not be imposed "in the absence of willfulness, bad faith, or fault". 762 F.2d at 1340. This, of course, is the very standard applied by the trial court and the Montana Supreme Court in the present case.

Nor has the Fifth Circuit been confused in the application of *Insurance Corporation of Ireland* and *National Hockey League.* Although it was considering a lesser sanction, the Fifth Circuit, in *Chilcutt v. U.S.*, 4 F.3d 1313 (5th Cir. 1993), citing *Societe Internationale,* expressly acknowledged that default judgment is a permissible sanction in cases involving conduct that is "willful or contumacious". 4 F.3d at 1322, fn. 22. Certainly the Fifth Circuit has not hesitated to follow *National Hockey League* in an appropriate case. *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990); *Day v. Allstate Ins. Co.*, 788 F.2d 1110, 1113 (5th Cir. 1986); *Glukstad v. Ineas Aereas Nacional,* 656 F.2d 976, 978 (5th Cir. 1982); *Sciambra v. Graham News Co.*, 841 F.2d 651, 655 (5th Cir. 1988); *Kabbe v. Rotan Mosle Inc.*, 752 F.2d 1083, 1084 (5th Cir. 1985); *Prince v. Poulos,* 876 F.2d 30, 32 (5th Cir. 1989).

Finally, Ethicon's assertion that state courts in Arizona, Florida and Texas are in disagreement with state courts in other jurisdictions in applying this Court's rulings in *Hammond* and *National Hockey League* is incorrect.[12] Thus, in *AG Rancho Equipment Co. v. Massey-*

[12]The Arizona and Florida cases cited by Ethicon are decisions of intermediate appellate state courts and, as such, do not

[footnote continued]

Ferguson, 123 Ariz. 122, 598 P.2d 100 (1979) the Arizona Supreme Court remanded for a hearing to determine whether a party's failure to comply with discovery had been willful or in bad faith, citing *National Hockey League* in holding that the sanction of default judgment is proper where the failure to comply is due to "willfulness, bad faith or fault", rather than to inability of the party to comply. 498 P.2d at 101. To the same effect, see *Gomez v. Pujols,* 546 So.2d 734, 14 Fla. L. Weekly 1270 (1989 Fl. App. D. 3)[13] and *Transamerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 918 (1991) (holding that default sanctions should not be assessed absent "flagrant bad faith" or "callous disregard for the responsibilities of discovery" and citing *National Hockey League*).

Neither the circuit courts nor the state courts have had difficulty in reconciling *Hammond, Societe Internationale, National Hockey League* and *Insurance Corporation of Ireland* because there is nothing to reconcile. Read in conjunction with one another, the rulings are consistent. Litigants are entitled to due process. However, as with other rights, the right to due process may be waived, voluntarily or involuntarily, by conduct. The sanction imposed by the trial court is nothing more than the consequence of an involuntary waiver by conduct. The extent of the sanction is a reflection of the conduct. Where the conduct of a litigant involves discovery abuse that is willful and in bad faith, it is within the discretion of the district court to determine

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necessarily represent the opinion of the highest court of those states.

[13]It appears that the issue has not been addressed by the Florida Supreme Court.

that the litigant has waived its right to due process and that the sanction of default judgment is appropriate.

CONCLUSION

Ethicon's Petition for Writ of Certiorari is a vain attempt to grace its discovery abuse with a cloak of legitimacy by claiming denial of due process. Ethicon cannot purge itself after the fact from the consequences of its own wrongdoing. After having wrought irreparable prejudice to Eisenmenger's case and to the court's ability to reach a fair decision on the merits, any lesser sanction than the one imposed by the Montana courts would benefit Ethicon at the expense of due process to Eisenmenger.

The trial judge in this case was well aware of the importance of discovery in the search for truth:

> In controlling discovery the district court must regulate traffic to insure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage. [Citation omitted] The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation. (p. 26a)

While certiorari is a vehicle for reconciling conflicting decisions of the circuit courts and of the state courts of last resort, certiorari should not be used to homogenize the discretionary functions of those courts. As one commentator said:

> It is both impossible to formulate a body of concrete rules concerning the imposition of discovery sanctions and unwise to do so because such standards would force unique factual situations into generalities devoid of the equitable considerations central to the discretionary function.[14]

In granting a default judgment on liability to Eisenmenger, the discretion which the trial judge exercised and which was affirmed by the Montana Supreme Court was within the range of discretion allowed to the federal circuit courts and the state courts to control flagrant discovery abuses and does not call for an exercise of this Court's power of supervision.

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[14]Note, *Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37*, 29 Case Western Reserve L.Rev. 603 (Spring, 1979).

For the reasons set forth in this brief, Ethicon, Inc.'s Petition for Writ of Certiorari to the Montana Supreme Court should be denied.

Respectfully submitted,

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August 12, 1994

(3)

Supreme Court, U.S.
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No. 94-87

In The

Supreme Court of the United States

October Term, 1994

ETHICON, INC.,

Petitioner,

v.

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent,

and

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments to the U.S. Constitution permit a state court to enter a default judgment against a defendant, pursuant to state procedural rules, as a sanction for years of willful, bad faith obstruction of the discovery process?

LIST OF PARTIES

Petitioner, Ethicon, Inc.

Respondent, Helen Kirwin Eisenmenger, an incapacitated person, by Veronica Eisenmenger, her Guardian and Conservator.

Cross-Respondents, James E. Mungas and Montana Deaconess Medical Center.

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In The

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JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Montana Supreme Court is reported at 51 Mont. St. Rep. 296 and 1994 Mont. LEXIS 75. The state district court decision is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT

On October 30, 1985, Helen Kirwin Eisenmenger (Eisenmenger) underwent a surgical procedure known as a left carotid endarterectomy[1] at Montana Deaconess Medical Center (MDMC) in Great Falls, Montana. James Mungas, M.D., a board-certified vascular surgeon, performed the surgery and closed the incision using a 6-0 Prolene suture manufactured by Ethicon. Dr. Mungas secured the suture by anchoring it at one end of the incision and sewing to the opposite end. This procedure is one of two commonly used closure techniques.[2] (Eth. App. at 252.)[3]

Fifty-four hours later, the suture broke at its midpoint. Dr. Mungas performed a second, emergency surgery and repaired the broken suture line. Following the

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[1] A carotid endarterectomy is the surgical removal of plaque on the intimal lining of a carotid artery.

[2] Petitioner now represents that this procedure is "not recommended by Ethicon." (Pet. at 4.) However, in deposition Ethicon's own in-house Director of Medical Affairs, and a board-certified surgeon, David Marshall, M.D., stated that Dr. Mungas' suturing technique was commonly used and was one of "two schools of technique". (Eth. App., p. 252.)

[3] Citations designated "Eth. App." refer to the Appendix that Ethicon filed with the Montana Supreme Court.

second surgery, Helen Kirwin Eisenmenger suffered a severe stroke.

PROCEDURAL HISTORY

The procedural history of this case is much more detailed and complex than that outlined by Ethicon. Because a more comprehensive review of the history is necessary for the Court to have a meaningful understanding of what occurred, Dr. Mungas provides the following additional facts.

A. The Federal Case

Eisenmenger initially brought this case as a product liability action against Ethicon in state district court on January 15, 1988. Ethicon removed the case to federal district court on the basis of diversity in February, 1988. In March of 1988, Ethicon answered Eisenmenger's Complaint with numerous defenses placing the cause of the suture's failure upon the negligence of Eisenmenger and the carelessness, misuse, and alterations of the suture by unnamed "others". (App. at 15, 16.)[4] Eisenmenger's second set of interrogatories sought to learn the identity of the "others" at fault for her injuries. Ethicon's responses to these interrogatories were evasive and incomplete.

On May 18, 1988, Ethicon retained a vascular surgeon, Cornelius Olcott, M.D., as an expert. Two months

[4] Citations designated "App." refer to the Appendix filed by Dr. Mungas with the Montana Supreme Court.

later, Dr. Olcott rendered his initial opinion to Ethicon. Dr. Olcott criticized almost every aspect of Dr. Mungas' and MDMC's care and treatment of Eisenmenger, from the initial diagnosis to post-surgical monitoring by the nursing staff.[5] (Eis. App. at 167-75.)[6] Despite knowledge of Dr. Olcott's opinions, Ethicon did not disclose the opinions and became increasingly deceptive and ambiguous in answering plaintiff's interrogatories.

Eisenmenger stipulated to the dismissal of the federal action, and refiled in state court, adding Dr. Mungas and MDMC as parties. (App. at 120-30.)

B. The State Court Case

In the state court case, Ethicon again raised a number of "others did it" defenses. Eisenmenger, Dr. Mungas, and MDMC again sought discovery aimed at eliciting any facts, evidence, witnesses or opinions held by Ethicon which established any misuse, alteration, or mishandling of the subject suture by Dr. Mungas or MDMC. Ethicon again answered elusively.[7]

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[5] Ethicon concealed Dr. Olcott's opinions for almost four years. It was not until March 30, 1992, which was six weeks *after* Mungas and MDMC were granted summary judgment, that Ethicon first revealed them. It was this conduct on the part of Ethicon that formed the basis for the sanction imposed by Judge McPhillips.

[6] Citations designated "Eis. App." refer to the appendix that was filed by Mrs. Eisenmenger with the Montana Supreme Court.

[7] For example, an interrogatory asking if Ethicon *had any* information that anyone other then Ethicon was at fault was

Ethicon first disclosed the identity of Dr. Olcott on August 30, 1991, in response to a pretrial scheduling order; however, it neither supplemented nor amended any of its earlier discovery responses with his opinions, which were by this time two years old.[8]

Three days after Dr. Olcott was disclosed, Dr. Mungas propounded three pointed interrogatories directed specifically at determining all information, including opinions, possessed by Dr. Olcott or Ethicon that suggested that any conduct of Dr. Mungas was the cause of Eisenmenger's injuries. Ethicon's answers to these interrogatories were deceitful, incomplete, late and "patently incorrect."[9] (Pet. at 44a.)

On February 13, 1992, District Court Judge McPhillips granted summary judgment in favor of MDMC and Dr. Mungas based on the absence of any expert testimony on the deviation from the standard of care on the part of either defendant and upon the court's ruling that the doctrine of *res ipsa loquitur* was not applicable. The court's ruling was founded on and would not have occurred but for Ethicon's having withheld the opinions of its expert, Dr. Olcott. (App. at 179.)

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answered: "Objection. Ethicon objects to this interrogatory on the grounds that it seeks a conclusion of law." (App. at 154.)

[8] Ultimately, Ethicon responded to approximately 1700 written discovery requests and never mentioned Dr. Olcott's opinion in *any* of them.

[9] In its Memorandum and Order of May 11, 1992, the District Court found these responses to be "patently incorrect". (Pet. at 44a.)

Six weeks later, Eisenmenger deposed Dr. Olcott, who, without hesitation, criticized nearly every aspect of Dr. Mungas' care and treatment of Eisenmenger. (Eis. App. at 169-73.) Dr. Olcott further testified that Ethicon's counsel, Charles Preuss, had given him the case for review in 1988; that "in general" he had the same opinions in 1988 as at the time of his deposition four years later; that he discussed the case with Mr. Preuss in 1988; and that he had other conversations with Mr. Preuss over the "ensuing three or four years". (Eis. App. at 173-174.)

Eisenmenger immediately filed a Motion for Sanctions because of Ethicon's willful concealment of relevant evidence on issues critical to the case, namely, the conduct of Dr. Mungas. The state district court granted the motion on May 11, 1992, by entering a default judgment as to liability. This was based on the following conduct on the part of Ethicon:

> – Ethicon actively participated in numerous hearings in which the conduct of Dr. Mungas and MDMC was before the district court without revealing the existence of the evidence.
>
> – Ethicon had never responded correctly to interrogatories addressed to the issue; had responded incompletely and evasively to numerous other interrogatories; and had failed to seasonably supplement or amend answers to interrogatories addressed to the issue.

(Pet. at 26a-45a.)

Because the court had determined that Ethicon was liable, the Great Falls, Montana jury only had to determine the amount of Eisenmenger's damages.

C. The Montana Supreme Court

Acting upon Ethicon's Petition, the Montana Supreme Court[10] reviewed the trial court record for abuse of discretion. (Pet. at 16a.) The Court held: "The record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith. . . . [T]he District Court did not abuse its discretion in imposing the sanction of default judgment . . . . " *Id.*

REASONS FOR DENYING THE WRIT

IN CASES IMPOSING SANCTIONS FOR DISCOVERY ABUSE, A TRIAL COURT'S PROPER APPLICATION OF MONTANA'S RULE 37(b) SATISFIES DUE PROCESS REQUIREMENTS.

This Court has held that if a trial court has properly applied Rule 37[11] in imposing sanctions for discovery abuse, due process is satisfied. *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706 (1982). Under this rule, the focus of inquiry is whether, in imposing the default judgment against Ethicon, the trial court properly applied Montana Rule of Civil Procedure 37(d). Montana Rule 37(d) provides that upon a party's failure to answer interrogatories, the trial

---

[10] The Montana Supreme Court's opinion is reprinted in the Petition starting on page 1a.

[11] A copy of the relevant portions of Montana Rule of Civil Procedure 37 is enclosed at Cross-Respondent's Appendix 1A.

court may make such orders as are just, including "any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule." Mont.R.Civ.P. 37(d). Rule 37(b)(2)(C) permits the court to render a default judgment against the disobedient party.

The trial court's proper application of this rule is established in Judge McPhillips' comprehensive Memorandum and Order. (Pet. at 26a-45a.) In it, he documented Ethicon's extensive failure to provide discovery, explaining why he entered the default authorized under Montana's Rule 37(b)(2)(C) stating:

> This Court recognizes that sanctions pursuant to Rule 37(d) as listed in Rule 37(b) should be tailored to the discovery abuse. Plaintiff has suffered extreme prejudice due to Defendant Ethicon's willful, deliberate and unconscionable discovery abuses. Defendant Ethicon's original responses were often evasive and incomplete. Defendant Ethicon failed to seasonably supplement the interrogatories served before August 31, 1991. As to the interrogatories served after August 31, 1991, Defendant Ethicon's answers are patently incorrect. Defendant Ethicon's actions have been willful and in bad faith. Defendant Ethicon has indulged in unpardonable gamesmanship. Defendant Ethicon has violated the basic principles and spirit of the rules of procedure.

(Pet. at 44a.)

Judge McPhillips' proper application of Montana's Rule 37(d) met the due process requirements of *Insurance Corp. of Ireland*, 456 U.S. at 706. On appeal, the proper test for review of the trial court's imposition of the sanctions

is abuse of discretion. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976). As such, the imposition of a Rule 37 sanction only violates due process if a trial court abused its discretion in the application of the sanction. *Id.* "The question, of course, is not whether this Court . . . would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id.* at 639. The standard of review which the Montana Supreme Court employs in reviewing sanctions imposed by district courts is an "abuse of discretion" standard. (Pet. at 11a, *citing First Bank (N.A.) – Billings v. Heidema*, 711 P.2d 1384 (Mont. 1986).) The Montana Supreme Court acknowledged that the "record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith." (Pet. at 16a.) "We hold that the district court did not abuse its discretion in imposing the sanction of default judgement on the issue of liability." *Id.*

The due process test for use in imposing discovery sanctions is concise and straightforward. Ethicon attempts to confuse the issue by misconstruing this Court's decision in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). The Court in *Hammond* held due process "was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* at 351. This Court found the authority for the creation of this presumption to be of the same nature as a court's "authority to default . . . because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not

answering . . . ." *Id.* The Court found it analogous to "the many other presumptions attached by the law . . . ." *Id.*

Ethicon attempts to eviscerate this presumption by arguing that if the offender had a meritorious defense, the presumption is destroyed. This would nullify the presumption and allow those who abuse discovery by hiding "meritorious defenses" to profit with impunity. This is not the holding in *Hammond Packing*, and Ethicon attempts to lead the Court astray on this point. Nothing in *Hammond* requires a court to analyze defenses, "meritorious" or otherwise, which are concealed by discovery abuse. The defendant Hammond's defenses were not mentioned by the Court because they were, by statute, presumed to be without merit because of discovery abuses. Likewise, the merits of Ethicon's defense are irrelevant. As Justice White stated in a similar situation: "Petitioners are attempting to create a logical conundrum out of a fairly straightforward matter." *Insurance Corp. of Ireland*, 456 U.S. at 696.

By the virtue of this Court's holding in *Insurance Corp. of Ireland*, the due process requirements referred to in *Hammond Packing* for the imposition of default judgement are satisfied by Rule 37(b). 456 U.S. at 706. The trial court's proper application of Montana's Rule 37(b) is the test and it is consistently employed in all of the circuits.

Ethicon incorrectly cites Justice White's opinion in *Insurance Corp. of Ireland* for the following proposition: "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption." (Pet. at 11.) Ethicon omitted the next sentence of the opinion, which is fatal to its argument. "A proper

application of Rule 37(b)(2) will, as a matter of law, support such a presumption." *Id.* at 706. In the instant case, the trial court properly applied Rule 37(d) Mont.R.Civ.P.[12] Under *Insurance Corp. of Ireland*, this application, as a matter of law, supports the *Hammond Packing* presumption.

Ethicon again extols its innocence in disputing the state district court's finding that it concealed material evidence, which the Montana Supreme Court approved. A similar situation confronted this Court in *Societe Internationale Puor Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). The Court dismissed attempts by a party to dispute the findings of the lower courts. *Id.* at 209. "We must dispose of this case on the basis of the findings . . . adopted by the District Court, and approved by the Court of Appeals." *Id.* In a like manner, the Montana Supreme Court held in this case: "The record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith. . . . [T]he District Court did not abuse its discretion in imposing the sanction of default judgement . . . ." (Pet. at 16a.) Thus, Ethicon's attempts to revisit the trial court's findings of fact are a misplaced and irrelevant distraction from the constitutional issues Ethicon's petition seemingly attempts to raise.

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[12] At time of the application, no corollary Federal Rule 37(d) existed; the Federal Rule was effective Dec. 1, 1993.

The trial court properly applied Montana's Rule 37. The Montana Supreme Court reviewed this imposition of sanctions and found no abuse of discretion by the trial court. The holding of the Montana Supreme Court should stand and petition should be denied.

II

THE CIRCUITS ARE UNIFORM IN HOLDING A TRIAL COURT'S PROPER APPLICATION OF RULE 37(b) SATISFIES DUE PROCESS REQUIREMENTS.

Ethicon seeks to portray a "very real conflict among the circuits" in need of clarification by the Supreme Court. (Pet. at 25.) An examination of the cases proves Ethicon is in error. The Circuits, including the Fifth and Ninth, are in harmony on this issue, all having held that a proper application of Rule 37(b) satisfies due process and that on review the imposition of Rule 37(b) sanctions is proper absent abuse of discretion by a trial court.

Ethicon's position that the *Hammond Packing* presumption has been extinguished by the abuse of discretion standard of review is without merit. This Court, in *Insurance Corp. of Ireland*, 457 U.S. at 705, held that Rule 37 sanctions embody the *Hammond Packing* presumption and that a proper application of it satisfies due process. "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption." *Id.* at 706. Absent abuse of discretion, Rule 37 sanctions support the *Hammond Packing* presumption and thus satisfy due process. *Id.* at 706.

Recent cases on Rule 37 default judgments have not "extinguished" *Hammond Packing;* they embodied it. *Id.* at 705. This is manifestly clear from this Court's statement in *Insurance Corp. of Ireland*: "Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Co. v. Arkansas* . . . for the due process limits on such rules." *Id.*

Ethicon's manufactured conflict deconstructs under scrutiny of the cases Ethicon cites for its proposition. The basis of this argument is that the Ninth and Fifth Circuits are different from the remainder. For example, Ethicon claims that the Ninth Circuit "has long held that, under *Hovey* and *Hammond Packing,* a default judgement is only appropriate where the party's conduct gives rise to a presumption that it has no evidence to offer in support of its claims or defenses." (Pet. at 25.) Ethicon claims the Fifth Circuit also "follows" *Hammond* as does the Ninth and that this creates a "very real conflict". (Pet. at 25.) This is convenient fiction. Review of the Ninth and Fifth Circuit cases reveals that they and all the other circuits apply the same test.

THE NINTH CIRCUIT

Ethicon cites five cases for its proposition that "a default judgement is only appropriate where the party's conduct gives rise to a presumption that it has no evidence to offer in support of its claims or defense". (Pet. at 21.) None of the cases Ethicon cites mention this proposition.

The latest three cases cited make no mention of either *Hovey* or *Hammond Packing,* let alone the presumption for

which Ethicon cites the cases. *Hovey v. Elliot*, 167 U.S. 409 (1897). In fact, all three cases stand for the *exact opposite* proposition: a default judgment is appropriate under Rule 37 only when sanctioning willful misconduct or bad faith, and the proper standard of review is abuse of discretion: "Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction." *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990). "We review the imposition of discovery sanctions under Rule 37 for abuse of discretion." *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). "A district court's orders and sanctions relating to discovery *will be overturned only for abuse of discretion*." *Munoz-Santana v. U.S. I.N.S.*, 742 F.2d 561, 562 (9th Cir. 1984) (emphasis supplied).

THE FIFTH CIRCUIT

Ethicon offers only one case, *Chilcutt v. United States*, 4 F.3d 1313 (5th Cir. 1993), to support its position that the Fifth Circuit "follows" *Hammond*. *Chilcutt*, however, does not even involve a default judgment, and the sanctioned party was not precluded "from presenting its case in chief, the sanction was a far cry from a default judgement." *Id.* at 1320.

Although unmentioned in the petition, the Fifth Circuit has addressed the issue of default judgments as a sanction. In *Coane v. Ferrara Pan Candy Co.*, the Fifth Circuit held "[i]n exercising our appellate function, we review the imposition of Fed. R. Civ. P. 37 sanctions under an abuse of discretion standard." 898 F.2d 1030,

1031 (5th Cir. 1990). In fact, the Fifth Circuit implemented this Court's decision in *National Hockey League*, the very year it was decided. *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976) (*citing National Hockey League*, 427 U.S. 639). "It is our responsibility solely to decide whether the district court could, in its discretion, have determined the appellant's conduct to be so flagrant as to justify striking its pleadings." *Id.*

There is no conflict between either the Ninth or Fifth Circuits and the other Circuits. All the circuits have implemented the abuse of discretion standard which this Court announced. *National Hockey League*, 427 U.S. at 642; *Farm Const. Services, Inc. v. Fudge*, 831 F.2d 18, 20 (1st Cir. 1987); *Jones v. Niagra Frontier Transp. Auth.*, 836 F.2d 731, 734 (2d Cir. 1987); *Mindek v. Rigatti*, 964 F.2d 1369, 1374 (3d Cir. 1992); *Mutual Federal Sav. & Loan v. Richards & Associates*, 872 F.2d 88, 92 (4th Cir. 1989); *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1031 (5th Cir. 1990); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990); *Hindmon v. National – Ben Franklin Life Insurance Corp.*, 677 F.2d 617, 620 (7th Cir. 1982); *Comiskey v. JFTJ Corp.*, 989 F.2d 1007, 1009 (8th Cir. 1993); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990); *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993); *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1993).

There is no conflict among the Circuits. *All Circuits* apply the rule this Court announced in *National Hockey League*. Ethicon's second argument raises no conflict between the Circuits nor any other issue for the Supreme Court to resolve.

III

ETHICON HAS NOT DOCUMENTED ANY TREND TOWARD MORE SEVERE SANCTIONS FOR DISCOVERY ABUSE, NOR IS THERE ONE.

Ethicon would have the Court believe that the litigants in the courts of this country are victims of "anti-discovery abuse fervor run amok". (Pet. at 29.) Citing what Ethicon claims to be a "trend toward more severe sanctions," Ethicon begs this Court to intercede on its behalf and rescue it from the results of its own dishonest conduct. (Pet. at 26.) Once again, Ethicon's claims are illusory and wholly unsupported. Ethicon lists six examples of default judgements in federal cases involving large damage amounts. This list hardly constitutes statistical evidence of a trend toward increasingly severe sanctions by overzealous courts. The examples more likely indicate that when the claims involved are large, some litigants will choose to abuse the discovery process.

Assuming, for argument's sake only, Ethicon's contention that there is a growing trend of "anti-discovery abuse," the instant case is a poor instrument for cautioning the nation's courts. In addition to the extensive and egregious scheme of discovery abuse, this case also involves a Montana district court's sanction which Montana Rule 37(d) authorizes, a rule then without a parallel Federal Rule until December 1993. Montana Rule of Civil Procedure 37(d), Federal Rule of Civil Procedure 37(d).

Ethicon's argument that the system has "run amok" ignores that the courts of this country are fully capable of addressing and handling this issue with Rule 37. Appellate courts will check any overzealous district court

which abuses its discretion. The system worked to effectively address the discovery transgressions in the instant case. The district court applied the available sanctions in response to Ethicon's willful misconduct, misconduct which worked to impede conducting a trial on the merits. A default judgement on the issue of liability was granted by the district court. A Montana jury determined the amount of Eisenmenger's damages. The Montana Supreme Court affirmed the verdict after considering Ethicon's violations of the Montana Rules of Civil Procedure and finding no abuse of the Court's discretion. The Montana Supreme Court's decision should stand and the Court should deny Ethicon's petition.

CONCLUSION

For all of the foregoing reasons, this Court should deny Ethicon's Petition for a Writ of Certiorari.

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APPENDIX

Montana Rules of Civil Procedure

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

. . . .

(b) Failure to Comply With Order.

. . . .

(2) ***Sanctions by Court in Which Action is Pending.*** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . .

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a

proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

MOTION FILED
AUG 12 1994

No. 94-87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

—v.—

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent,

—and—

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MONTANA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER ETHICON, INC.

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her Guardian and Conservator,

Respondent,

and

JAMES E. MUNGAS and
MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER ETHICON, INC.

Pursuant to Rule 37.2 of the Rules of this Court, American Cyanamid Co., Boots Pharmaceuticals, Bristol-Myers Squibb, CIBA-GEIGY Corporation, Hoffmann-LaRoche Inc., Pfizer Inc., the Pharmaceutical Research and Manufacturers of America, Rhone-Poulenc Rorer Inc., Schering-Plough Corporation, The Upjohn Co. and Warner-Lambert Company

respectfully move the Court for leave to file a brief *amici curiae*. Counsel for Respondent, Helen Eisenmenger, declined on August 10, 1994 to consent to filing; the petitioner has granted its consent.

Movant the Pharmaceutical Research and Manufacturers of America (PhRMA), is a voluntary, nonprofit association representing more than 100 research-intensive companies engaged in the discovery and development of prescription pharmaceutical products. Each year, PhRMA members invest more than $13 billion in research and development. These private research efforts are the source of virtually all new medicines developed in the United States. PhRMA member companies, together with the physicians who prescribe and the patients who use their products, have a keen interest in ensuring that product liability actions are decided fairly and with due regard to the Constitutional rights of the parties involved.

The other movants are all companies engaged in the manufacture and sale of prescription drugs and devices. Each has been sued in various courts throughout the United States by plaintiffs claiming to have been injured by defective medicines and other medical products. Many of these lawsuits involve defendants in addition to the drug or device manufacturer. Typically, these include the treating physician and hospital. Thus, like Ethicon, Inc. in the case below, the manufacturers are often faced with claims stemming from injuries that a plaintiff asserts have been caused by the fault of more than one party. Moreover, like Ethicon, are often faced with contention interrogatories, *i.e.*, discovery requests that require the answering party to identify and apply its liability contentions to known or discoverable facts.

Movants believe that the decision of the Montana Supreme Court upholding a default liability judgment against Ethicon for allegedly failing to provide complete information in response to selected contention interrogatories concerning negligence by its codefendants was wrongly decided. More importantly, movants believe that the decision represents a serious departure from the protections afforded to litigants under the Fifth and Fourteenth Amendments to the United States Constitution because it deprived Ethicon of its defenses without any warning or other procedural guarantee of due process. Contrary to the express requirement of *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 705 (1982), dismissal of Ethicon's defenses was neither "just" nor supported by a presumption that Ethicon lacked support for its asserted defenses, many of which were independent of the contention information requested in the interrogatories. Movants believe that the attached brief of *amici curiae* will assist this Court in evaluating the issue raised in Ethicon's Petition for a Writ of Certiorari.

For the foregoing reasons, the motion of American Cyanamid Co., Boots Pharmaceuticals, Bristol-Myers Squibb, CIBA-GEIGY Corporation, Hoffmann-LaRoche Inc., Pfizer Inc., the Pharmaceutical Research and Manufacturers of America, Rhone-Poulenc Rorer, Inc., Schering-Plough Corporation, The Upjohn Co. and Warner-Lambert Company to file a brief *amici curiae* in support of Ethicon's Petition for a

Writ of Certiorari to the Supreme Court of the State of Montana should be granted.

Respectfully submitted,

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IN THE

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Petitioner,

- v. -

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by VERONICA EISENMENGER,
her Guardian and Conservator,

Respondent,

and

JAMES E. MUNGAS and
MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF ETHICON, INC.'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

QUESTION PRESENTED

Whether, under the Fifth and Fourteenth Amendments to the United States Constitution, a court may, without warning, enter a default liability judgment against a party based

solely on the party's failure to disclose an opinion harbored by its expert, where the party could prevail at trial without eliciting that opinion and where the failure to disclose the opinion does not support a presumption that the party lacks meritorious defenses.

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INTEREST OF AMICI CURIAE

American Cyanamid Co., Boots Pharmaceuticals, Bristol-Myers Squibb, CIBA-GEIGY Corporation, Hoffmann-LaRoche Inc., Pfizer Inc., Rhone-Poulenc Rorer Inc., Schering-Plough Corporation, The Upjohn Co. and Warner-Lambert Company are all companies engaged in the manufacture and sale of prescription drugs and devices. Each is regularly sued in various courts throughout the United States by plaintiffs claiming to have been injured by defective medicines or other medical products. These amici are joined in this brief by the Pharmaceutical Research and Manufacturers of America (PhRMA). PhRMA's membership is comprised of an even larger group of more than 100 pharmaceutical companies. Collectively, its member companies produce the vast majority of prescription medicines sold in the United States.

Amici share a general interest in safeguarding the due process rights of litigants. In addition, amici share a common belief that the decision below will further burden the litigation process by forcing drug and device manufacturers to adopt and advance unwanted litigation positions in cases where treating physicians are also named as defendants. In this case, Ethicon, Inc. was sanctioned because it did not reveal, in response to contention interrogatories, that its expert believed that plaintiff's surgeon had been negligent. There is no evidence that Ethicon intended to solicit this opinion from its expert at trial, and there is no claim that Ethicon failed to disclose relevant facts upon which the expert's opinion was based.

In the interrogatory responses for which Ethicon was sanctioned, Ethicon contended that the opening in plaintiff's

suture was caused, in part, by the surgical technique used to close the incision, and not by any defect in the suture itself. (A 198-200) In other words, Ethicon planned to argue that the suturing technique caused the injury, but it did not plan to assume the additional burden of proving that the use of this technique deviated from the standard of surgical care applicable to physicians practicing in the State of Montana. There are legitimate tactical and business reasons why a large, out-of-state manufacturing defendant, such as Ethicon, might choose not to contend that a local, codefendant physician that uses its product was negligent, even if the company knows that such an argument might be made and could be supported by expert testimony.

Amici believe that discovery sanctions are inappropriate if based on a defendant's failure to adopt or disclose an expert's opinion that the defendant does not intend to elicit at trial, particularly where the defendant can prevail on the merits without eliciting that opinion. In this case, for example, Ethicon could have prevailed solely by proving that its product, a suture, was not defective. It was not necessary for Ethicon to contend or prove that the defendant doctor's surgical technique was improper and that consequently the plaintiff's injuries were caused by his negligence. To deprive Ethicon of all its defenses in this circumstance punishes Ethicon for choosing not to pursue defenses that its expert may have believed, but which Ethicon itself was not obligated to adopt.

Amici do not endorse discovery abuse. If an expert's opinion is not properly disclosed in discovery, that opinion may be excluded from evidence at trial. But amici do not believe that drug and device manufacturers should be required to

contend that a given practice by a physician is negligent under local law, even if that opinion is harbored by the manufacturer's expert. In effect, Ethicon was required to adopt its expert's opinion as its own or lose all its defenses. The court effectively imposed this requirement on Ethicon by entering a liability judgment without warning and without any reason to think that Ethicon lacked meritorious defenses.

BACKGROUND AND FACTS

Not infrequently, when a plaintiff sues a manufacturer for injuries stemming from an allegedly defective medicine or medical device, the plaintiff also sues the treating physician. *See* L. Frumer and M. Friedman, *Products Liability* § 53.02[4] (1994) (encouraging joinder of manufacturer and physician). The claims asserted in such cases against a defendant doctor and a defendant manufacturer are different. In the case of the physician, plaintiffs typically claim there was negligence, *i.e.*, that the plaintiff's injury resulted from a course of treatment, employing a medicine or medical device, that deviated in some manner from the requisite standard of care.[1] The manufacturer, by contrast, is usually sued on a strict liability theory. Depending upon the type of strict liability asserted, this theory can be less onerous to prove than negligence, because it requires no showing of fault. *See* L. Frumer and M. Friedman,

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[1] This standard of care can vary depending upon the medical community in which the physician practices and the medical specialty in question. *See* Restatement (Second) of Torts, § 299A (1965). Under Montana law, physicians are subject to different standards of care depending upon (1) when the treatment occurred, (2) whether the practitioner is board certified as a specialist, and (3) the locality in which the physician practices. *Chapel v. Allison*, 241 Mont. 83, 785 P.2d 204 (Mont. 1990).

Products Liability, supra, § 1.06; Restatement (Second) of Torts, *supra,* § 402A; *Jackson v. Coast Paint and Lacquer Co.,* 499 F.2d 809, 812 (9th Cir. 1974) (Montana law). Regardless of fault, however, the plaintiff is required to prove that the product was defective and that the defect caused the plaintiff's injury. W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts* §§ 41, 42 (5th Ed. 1984); Restatement (Second) of Torts, *supra,* § 430; *Young v. Flathead County,* 232 Mont. 274, 281-82, 757 P.2d 772, 777 (Mont. 1988); *Rost v. C.F.& I. Steel Corp.,* 189 Mont. 485, 616 P.2d 383, 386 (Mont. 1980). Absent proof that the defect in the product caused the injury in question, the manufacturer is not liable.

The presence of multiple defendants in the same case, each of whom may be subject to a different liability standard, influences the course of the litigation, including discovery. This is particularly true where, as here, the manufacturer asserts that its product was not defective and that something other than a defect in its product was the cause of the plaintiff's injuries. In some cases, the manufacturer may attribute plaintiff's injuries to negligence by the treating physician. *E.g., Meschino v. North American Drager, Inc.,* 841 F.2d 429 (1st Cir. 1988) (negligent use of medical device); *Bristol-Myers Co. v. Gonzales,* 561 S.W.2d 801 (Tex. 1978) (negligent method of administration by doctor). In other cases, the cause does not rise to the level of negligence. For example, in the typical case alleging that a prescription drug is defective because it is accompanied by inadequate warnings, proximate cause is negated by a demonstration that the physician prescribed the drug with full knowledge of its side effects. *See, e.g., Lindsay v. Ortho Pharmaceutical Corp.,* 637 F.2d 87, 92 (2d Cir. 1980) (New York law); *Stewart v. Janssen Pharmaceutica, Inc.,* 780

S.W.2d 910, 912 (Tex. Civ. App. 1989) (Texas law); *Mampe v. Ayerst Laboratories,* 548 A.2d 798, 803 (D.C. App. 1988) (District of Columbia law). Such conduct by the physician, while hardly negligent, is sufficient reason to conclude that the manufacturer's warning did not proximately cause the injury. *See also Plummer v. Lederle Laboratories,* 819 F.2d 349, 358-59 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987) (California law) (allegedly inadequate warning not a proximate cause of plaintiff's injury where the physician knew product's risks but did not tell patient's parent).

In this case, Ethicon stopped short of contending that plaintiff's surgeon, Dr. James Mungas, was negligent. Instead, Ethicon's responses to Dr. Mungas' contention interrogatories disclosed an intent to argue that plaintiff's injuries were not caused by any defect in the Ethicon suture, but were attributable, in part, to the technique Dr. Mungas used to suture plaintiff's incision, *i.e.,* working continuously from one end of the incision to the other with a single suture. But the possibility that this suturing technique may have caused the incision to open does not necessarily mean that its use constituted negligence under the standard of care applicable to surgeons practicing in Montana. Indeed, plaintiff herself abandoned a claim of negligence against Dr. Mungas, despite knowledge that he used the continuous suture technique to close the incision, because plaintiff's experts, Dr. Frederick Hetzel and Dr. Paul Collier, took a position similar to Ethicon's. Neither claimed that Dr. Mungas was negligent. Significantly, Dr. Collier, a surgeon practicing in Pennsylvania, testified that he himself did not use the continuous suture technique employed by Dr. Mungas. Yet he did not testify that Dr. Mungas' technique deviated from the applicable standard of care. (A 185-87, 190)

Venturing beyond Ethicon's contentions, however, Ethicon's expert, Dr. Cornelious Olcott, testified that, in his opinion, Dr. Mungas was negligent. He did so at his deposition in response to questions posed by plaintiff's counsel. The plaintiff then moved for sanctions, and the trial court found that Ethicon had willfully abused the discovery process because its responses to plaintiff's contention interrogatories did not disclose Dr. Olcott's opinion regarding Dr. Mungas' surgical technique. (A 438) The trial court observed that Ethicon, through its counsel, had knowledge of Dr. Olcott's opinion when Ethicon answered the interrogatories. (A 436) Notably, the court did not find that Ethicon intended to solicit this opinion from Dr. Olcott at trial. Nor did it find that Ethicon contended that Dr. Mungas was negligent. Nevertheless, the court determined that Ethicon's failure to disclose Dr. Olcott's opinion in its interrogatory answers amounted to "knowing concealment." (A 437)

The trial court's Memorandum and Order recites a litany of contention interrogatories demanding that Ethicon state its contentions with respect to the etiology of plaintiff's injury. (A 418-33) In response to the earliest of these interrogatories Ethicon stated that it was unable to respond due to a lack of information, but indicated that it intended to "examine the etiology of plaintiff's cerebral vascular accident and may, depending upon the outcome of discovery, offer expert medical opinion on this subject." (A 421-28) Later, after the discovery was more fully developed, Ethicon attributed plaintiff's injury, in part, to "the surgical technique employed" during the operation. (A 198-200) In addition, Ethicon produced a "Dear Doctor" letter that was sent to surgeons prior to plaintiff's operation which cautioned that use of the continuous suture

technique employed by Dr. Mungas increased the risk that the suture could untie following surgery. (A 005)

The trial court held Ethicon responsible for plaintiff's decision to abandon her claim of negligence against Dr. Mungas, by finding that plaintiff would not have done so had she known of Dr. Olcott's opinion. (A 437) The trial court also blamed Ethicon for the court's decision to grant Dr. Mungas summary judgment on plaintiff's claim of *res ipsa loquitur*. (*Id.*) The possibility of precluding Dr. Olcott from testifying was apparently considered, but was rejected as insufficiently severe. (A 438) Instead, the court entered a liability judgment against Ethicon and proceeded to a trial on damages.

At the damages hearing, the court expressed misgivings about the sanction's severity, but it did not modify the sanction it had imposed. (A 309, 311) Despite the trial court's misgivings, the Montana Supreme Court upheld the default sanction based on the trial court's finding that Ethicon's responses were made in bad faith.

ARGUMENT

THE DECISION BELOW UNFAIRLY COERCES MANUFACTURERS OF MEDICINES AND MEDICAL PRODUCTS TO COMPLICATE THE LITIGATION PROCESS BY ADOPTING UNWANTED LITIGATION POSITIONS IN CASES INVOLVING TREATING PHYSICIANS

This Court has made it clear that use of the default sanction is constrained by the Due Process Clause of the U.S. Constitution because it deprives litigants of their opportunity to be heard. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites De Guinee*, 456 U.S. 694 (1982), *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909); *Hovey v. Elliott*, 167 U.S. 409 (1897). Most recently, these limits were described in *Insurance Corp. of Ireland, supra*, 456 U.S. at 707:

> Rule 37(b)(2) [of the Federal Rules of Civil Procedure] contains two standards–one general and one specific–that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing, supra*, the former represents the

general due process restrictions on the court's discretion.[2]

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) appears to address the first requirement—that the sanction be just. That case upheld dismissal as a sanction where the plaintiff had engaged in "flagrant bad faith" by failing, during a 17 month period, to answer interrogatories despite numerous warnings and an order from the court directing it to do so. *Id.* at 640-41. This Court held that, under the circumstances there presented, the trial court did not abuse its discretion by dismissing plaintiff's complaint. *Id.* at 643.[3]

The Montana Supreme Court upheld the entry of a default liability judgment based on the trial court's finding that Ethicon's failure to disclose Dr. Olcott's opinion constituted willful discovery abuse. But that finding rested on a false premise. The interrogatories to which Ethicon responded were contention interrogatories. Dr. Olcott's opinions were responsive to those interrogatories only to extent that Ethicon

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[2]The *Hammond Packing* limitation is itself a limitation imposed by the Due Process Clause. 212 U.S. at 351.

[3]As noted in Ethicon's Petition for a Writ of Certiorari, despite this Court's statement in *Insurance Corp. of Ireland, Ltd., supra,* that there are two requisites that must be satisfied in order to comport with the requirements of the Due Process Clause, some circuit courts have read *National Hockey League* to permit dismissal solely on the basis of bad faith. *E.g., Valentine v. Museum of Modern Art,* No. 93-9350, 1994 WL 324557 (2d Cir. July 5, 1994).

adopted them as contentions. Here, there was no finding that Ethicon contended that Dr. Mungas was negligent or that it needed to prove the doctor's negligence in order to prevail on the merits. In the absence of such findings, Ethicon cannot be said to have abused the discovery process, because it cannot be said to have misstated its contentions.

The contentions Ethicon did disclose—that the suture was not defective and that it opened due, in part, to the suturing technique used—provided sufficient grounds for a judgment in Ethicon's favor. Neither contention required Ethicon to prove that Dr. Mungas was negligent under Montana law. Indeed, plaintiff herself conceded that her injury could have occurred in the absence of negligence by the doctor. (A 182)

Adverse surgical results are not always, or even usually, caused by negligence. The "mere fact that an operation does not result in a favorable outcome does not establish—or even constitute evidence of—a deviation from the standard of care." *Campbell v. United States,* 904 F.2d 1188, 1192 (7th Cir. 1990). Moreover, medicine is not an exact science, and different physicians may appropriately use and advocate different techniques. For that reason, "differences in medical opinion are not inconsistent with due care." *Id.*, 904 F.2d at 1193. This is particularly so given that the applicable standard of care can vary depending on the practitioner, location and time of surgery. *Chapel v. Allison, supra.* Surely Dr. Olcott's opinion that Dr. Mungas' technique was negligent is an opinion upon which reasonable minds can differ. Ethicon was free to adopt or reject it. *See also MacGuiness v. United States,* 738 F. Supp. 566, 571 (D.D.C. 1990), *aff'd,* 927 F.2d 1258 (D.C. Cir. 1991) (no negligence despite use of surgical technique

described as "not preferred"); *Lindley v. Hamilton,* 883 F.2d 360, 363 (5th Cir. 1989) (alternate courses of treatment both met standard of care); *East v. United States,* 745 F. Supp. 1142, 1149 (D. Md. 1990) ("a doctor cannot be found liable simply because another doctor criticizes the care provided and would not have provided the same care").

The freedom to choose whether to assert physician negligence is important to amici generally. Because medicine is not an exact science, practitioners frequently disagree as to the best method to treat an illness or perform a given procedure. These disagreements do not imply negligence. There can and should be a proliferation of medical techniques and approaches. *See* Joseph E. Campbell, *Civil Liability for Investigational Drugs: Part II,* 42 Temple Law Quarterly 289, 311 (1969) (stressing importance of investigational techniques in furthering medical progress). Amici themselves frequently compete with one another to persuade physicians that one drug or device is better suited to a particular problem than another. But amici recognize that many approaches and techniques are valid, and none believe that a physician who chooses a competing product or uses a technique other than that recommended is for that reason guilty of malpractice.

Ethicon decided in this case not to contend that Dr. Mungas was negligent, even though it retained a respected expert who believed that he was. The record does not reveal the reasons for Ethicon's decision. It is possible that Ethicon considered the views of Dr. Olcott and disagreed with him or concluded that a jury would not find his opinion persuasive. It is also possible that Ethicon made this decision simply to protect its good will among its customers, Montana surgeons. But

whatever the reason for its decision, there can be no doubt that Dr. Mungas' technique could have caused the suture to open without rising to the level of negligence. Thus, as a matter of science, common sense and business practice, Ethicon's contentions were perfectly proper.

Because Ethicon did not contend that Dr. Mungas was negligent, it did not abuse the discovery process by not revealing Dr. Olcott's opinion in response to contention interrogatories. Ethicon was never warned that its responses were improper, it never defaulted on any of its promises, it was never ordered to answer the interrogatories any differently than it did, and it never violated any order. Because Ethicon could have prevailed at trial without claiming or proving that Dr. Mungas was negligent, the entry of a default judgment, based on responses that had not been previously challenged, was fundamentally unjust and violated Ethicon's due process rights.

The basic harm created by this decision, however, is not limited to the $2.3 million default judgment imposed as a sanction against Ethicon. It is far more reaching and will prove more costly to pharmaceutical and medical device manufacturers, as well as to the American consuming public. Armed with this precedent, plaintiffs will seek to shift their burden of proof vis-a-vis defendant pharmaceutical manufacturers and physicians, forcing such defendants to prove the plaintiff's case against each other. Faced with this precedent, pharmaceutical manufacturers and physicians will be compelled to pursue claims against each other in order to avoid sanctions, ignoring the fact that unsuccessful medical procedures do not necessarily result from negligent medical care or defective medical products. As a consequence,

pharmaceutical and medical device product liability litigation will become an even more complicated and expensive process for the parties and the courts.

At a time when our country actively addresses universal health coverage and the need to reduce the costs of medical care, *see* Adam Clymer, *Debate is Begun on Mitchell Plan for Health Care,* N. Y. Times, August 10, 1994 at A1, it is ironic that the inevitable result of the trial court's decision will be to increase medical costs. The prudent defense strategy for a pharmaceutical manufacturer, sued together with a treating physician, will now be to pursue all potential claims against the codefendant physician, regardless of whether it makes tactical or business sense and regardless of the increased defense costs thereby imposed on both the manufacturer and the physician. Unfortunately, basic principles of economics dictate that these defense costs will ultimately be passed on to the purchasing public by the manufacturer as well as the doctor. *See generally* Louis Lasanga, *The Chilling Effect of Product Liability on New Drug Development, in* The Liability Maze: The Impact of Liability Law on Safety and Innovation 334, 335 (Peter W. Huber, et al. eds., 1991).

The decision below denied Ethicon the right to assert meritorious defenses without any basis for presuming that Ethicon had none, and it deprived Ethicon of its rights under the Fifth and Fourteenth Amendments to the United States Constitution. The decision below will also impose costly burdens on defendant manufacturers and physicians, as well as on the people who benefit from the medical products and care provided by such defendants.

CONCLUSION

For the foregoing reasons, American Cyanamid Co, Boots Pharmaceuticals, Bristol-Myers Squibb, CIBA-GEIGY Corporation, Hoffmann-LaRoche Inc., Pfizer Inc., the Pharmaceutical Research and Manufacturers of America, Rhone-Poulenc Rorer Inc., Schering-Plough Corporation, The Upjohn Co. and Warner-Lambert Company all support Ethicon, Inc.'s Petition for a Writ of Certiorari to the Supreme Court of the State of Montana.

Respectfully submitted,

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(5)

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No. 94-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

v.

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent.

– and –

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Pursuant to Rule 21.4 of the rules of this Court, Helen Kirwin Eisenmenger, Respondent (hereinafter "Eisenmenger") responds to the Motion for Leave to File Brief Amici Curiae. The motion should be denied because Amici Curiae do not bring to the attention of the Court a federal question or other relevant matters that have not already been brought to its attention by the parties.

SUMMARY OF ARGUMENT

Clearly, Amici's due process argument has already been brought to the Court's attention by Ethicon. Amici's argument that the state court's rulings were "wrongly decided" (Mot. for Leave, p. 3) is simply Ethicon's evidentiary sufficiency argument in disguise and is a transparent attempt to have this Court conduct a *de novo* examination of the trial court's findings of willful, bad faith discovery abuse. Finally, Amici's contention that a Montana court's interpretation of Montana procedural rules will "impose costly burdens" (Br. of Amici, p. 13) and otherwise have a drastic nationwide impact on the litigation strategies of manufacturers is nothing more than undocumented hyperbole.

REASONS TO DENY THE MOTION FOR LEAVE

Amici attempts to rationalize Ethicon's willful concealments by asserting that the discovery abuse related only to "contention interrogatories concerning negligence". (Mot. for Leave, p. 3) This assertion is untrue. The discovery propounded to Ethicon related to (1) specific affirmative defenses alleged by *Ethicon,* including, *but not limited to,* allegations of negligence, and (2) the critical issues of causation and the identity of persons who would testify on causation, *regardless* of negligence by Mungas.

The affirmative defenses alleged by Ethicon included the following:

TWELFTH DEFENSE

> Persons or entities other than this answering defendant were *careless, negligent or otherwise legally at fault. . . .*

THIRTEENTH DEFENSE

There were one or more *independent intervening causes* for any of the injuries or damages suffered. . . .

FOURTEENTH DEFENSE

Any injuries or losses suffered or sustained . . . [were] *caused,* wholly or at least in part, by misuse of this defendant's product. . . .

FIFTEENTH DEFENSE

The suture material described in Plaintiff's Complaint was altered or otherwise changed after said material left the custody and control of this defendant. . . . (EA 57)

Thus, both the issues of causation and of Mungas' negligence, were at issue, having been affirmatively alleged as defenses by Ethicon.

Eisenmenger and Mungas were entitled to, and did, inquire into the bases of Ethicon's affirmative defenses. The following are typical of the interrogatories propounded:

INTERROGATORY NO. 110: In your "[Twelfth] Defense" you indicate that persons or entities other than Ethicon, Inc., were *careless, negligent or otherwise legally at fault* for the damages alleged in plaintiff's complaint. As to this defense, please answer and identify:

a. Each such person or entity which or who was careless, negligent or otherwise legally at fault;

b. Each act or omission of each person or entity listed in your response to subparagraph "a" which

you contend constitutes carelessness, negligence or legal fault;

c. Every person who has any information to support your contention that the person or entity identified in your response to subparagraph "a" was careless, negligent or otherwise legally at fault;

d. Every document or tangible evidence which supports your contention that the person(s) or entity(ies) listed in your answer to subparagraph "a" was (were) careless, negligent or otherwise legally at fault;

e. Identify the custodian of the document(s) or tangible(s) identified in your response to subparagraph "d". (EA 87)[1]

* * * * * * *

INTERROGATORY NO. 1: Is it your contention that Defendant James E. Mungas *caused* or contributed to the injuries or damages allegedly suffered or sustained by the Plaintiff, as more fully described in her Complaint? If so, please set forth with particularity and in detail:

a. each and every fact supporting this contention;

b. the identity of any and all persons who could or would testify as to the truthfulness of this contention; and

c. the identity of all writings, notes, letters, records, or any other document which could or would support the truthfulness of this contention. (EA 121)

* * * * * * *

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[1]This interrogatory was originally propounded in the federal case, and was re-asked in the state case at Interrogatory 149A dated 1/12/90 and responded to by Ethicon on 6/29/90.

> *INTERROGATORY NO. 139:* From your review of the evidence in this case, including the deposition testimony, do you contend that an act or omission of Dr. Mungas *caused* or contributed to the stroke which Helen K. Eisenmenger suffered between 11:00 p.m. November 1, 1985 and 8:00 a.m. November 2, 1985. (EA 100)

These interrogatories, and others similar to them,[2] were propounded to Ethicon for more than three years. Clearly, they concern causation, not merely the negligence of Mungas. Ethicon repeatedly responded untruthfully (not merely "evasively" or "incompletely"). Ethicon did not abandon its affirmative defenses. To the contrary, Ethicon admitted that after concealing its causation evidence in order to obtain strategic advantage, it intended to use Olcott's causation testimony in its defense at trial. (EA 163-6; Supp. Br. of Defendant/Appellant Ethicon, Inc. dated 10/6/93)[3] As noted by the Montana Supreme Court, this is not a case where the "wrong" questions were asked and the "critical answers"

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[2]Numerous other interrogatories specifically sought Ethicon's information on causation and the identity of Ethicon's causation witnesses. *See, e.g.*, Interrogatories 127, 128A, 129, 129A, 133A, 134A, 135, 135A, 140, 140A, 147, 149A (EA 85-119), and Mungas Interrogatories 1 and 3 (EA 121-124).

[3]Both the trial court and the Montana Supreme Court recognized the strategic advantage to Ethicon from the use of the concealed evidence on the issue of causation, and even if it were not used to prove negligence by Mungas.

> . . . [A]s the District Court recognized and Ethicon admits, Ethicon would, if allowed, seek to use the concealed evidence at trial as relevant to causation. The concealed evidence clearly went to the heart of Ethicon's defense to Eisenmenger's claim. (p. 15a)

were merely "artfully avoided". There was "nothing more which could have been asked" in order to elicit the evidence. (p. 15a)

Amici asserts that it does "not believe that drug and device manufacturers should be required to contend that a given practice by a physician is negligent under local law, even if that opinion is harbored by the manufacturer's expert." (Br. of Amici, pp. 2-3)[4] This statement distorts the holding of the Montana courts. Nothing in the decisions of the Montana courts compels a manufacturer to adopt an unwanted litigation strategy or assert negligence against a doctor using its product. The holding of the Montana courts is simple and straightforward – when a litigant alleges that the injury was attributable to some other cause, the litigant must respond truthfully to discovery which elicits the litigant's evidence supporting the allegation. Failure to respond truthfully may be sanctioned under Rule 37(d) of the Montana Rules of Civil Procedure. If the litigant's conduct is willful and in bad faith, the trial court's discre-

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[4]In support of this statement, Amici asserts "there was no finding that Ethicon contended that Dr. Mungas was negligent . . ." (Br. of Amici, p. 10) and that "Ethicon decided in this case not to contend that Dr. Mungas was negligent. . . ." (Br. of Amici, p. 11) Both of these statements are untrue. Only one day *before* the trial court's imposition of sanctions, Ethicon submitted "Defendant's Contentions" for inclusion in the proposed Pretrial Order, which contentions included, nearly verbatim, Ethicon's affirmative defenses alleging negligence by Mungas, independent intervening cause, misuse and/or alteration of the product. (EA 163-166) Ethicon certainly did not disclose in its responses to the interrogatories that it had "abandoned" its affirmative defenses. Its claim of abandonment came as an afterthought and as a last ditch attempt to convince the trial court that it should be permitted to use the concealed evidence on the issue of causation.

tion to sanction under Rule 37(d) includes the power to grant default judgment on liability.

This holding is hardly novel. Rather it is similar to holdings in many other jurisdictions. As a rule of the Montana courts, the holding does not present a federal question. Nor does it bind the federal courts or the courts of any other state. Accordingly, Amici's forebodings of dire, nationwide consequences are exaggerated and unsupported by the record and certainly do not merit the certiorari jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, the motion of Amici Curiae does not bring to the attention of the Court a federal question or other relevant matters that have not already been brought to its attention by the parties. Therefore, the Motion for Leave to File Brief Amici Curiae should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

—v.—

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent,

—and—

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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The Briefs In Opposition

The briefs in opposition filed by plaintiff Helen Eisenmenger and co-defendant Dr. James E. Mungas are devoted primarily to an attack on Ethicon's incomplete discovery responses and the trial court's finding that Ethicon engaged in a bad faith attempt to hide the opinion of its expert Dr. Olcott. But neither of these points is dispositive of the question

raised by Ethicon's petition, *viz*: whether, on the record of this case, the entry of a default judgment was consistent with the requirements of due process. Before that question can be answered, it must first be determined what standard governs the entry of default judgments in cases of discovery abuse.

Mrs. Eisenmenger and Dr. Mungas contend that it is enough that the Montana courts found that Ethicon had engaged in bad faith discovery abuse. Ethicon believes, however, that an additional inquiry must be made. That inquiry must focus on whether Ethicon's conduct, including its discovery "abuse", gives rise to a presumption that it had no defense whatsoever to the claim that its suture was defective. Whether this additional inquiry must be made is the basis of the conflict between the Circuits (as well as between the various State Supreme Courts) identified in our Petition.

I

THE EFFECT OF THE FINDING OF "BAD FAITH" DISCOVERY ABUSE

Ethicon does not dispute the rather obvious fact that the Montana courts found that it had acted in bad faith in failing to disclose its expert's opinion regarding the suturing technique utilized by Dr. Mungas. But this finding is not dispositive. Indeed, the question raised by Ethicon's Petition is whether this finding is sufficient *by itself* to satisfy the due process requirements for the entry of a default judgment.

That, of course, is the reason for the lengthy discussion of the record in Ethicon's Petition (pp. 11-18). What the record discloses is that, at most, Ethicon was guilty of failing to disclose the fact that its expert harbored an opinion that Dr. Mungas was negligent in affixing the original suture. Thus the trial court could well have found that Ethicon's failure to disclose that opinion was tantamount to an admission that it had no evidence of negligence on Dr. Mungas' part. But that is a far cry from finding that Ethicon implicitly admitted that it

had no evidence whatsoever to offer in its defense. Because the record plainly does not support that presumption, the entry of a default judgment was improper.

II

THE INTERPLAY BETWEEN RULE 37 AND DUE PROCESS

Ethicon likewise does not dispute the proposition that a proper application of Montana Rule 37 (which is identical to Federal Rule 37) satisfies the requirements of due process. As noted in our Petition (pp. 27-28), the Advisory Committee notes to Rule 37 specifically incorporate the constitutional limitation on default judgments reflected in this Court's opinions in *Hovey* v. *Elliott*, 167 U.S. 409 (1897), and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909).

The question in this case, as in any other case involving preclusory sanctions under Rule 37, is whether the Rule was properly followed and whether the sanction in question was appropriate. Indeed, the Advisory Committee has noted that the issue in a case involving preclusory sanctions under Rule 37 is whether those sanctions:

> "are in accord with *Hammond Packing* . . . which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey* v. *Elliott* . . . for the mere purpose of punishing for contempt." [Full citations omitted.]

The record in this case discloses beyond doubt that the default judgment was entered for the latter purpose, *i.e.* "for the mere purpose of punishing for contempt". This is impermissible. A "justifiable" sanction would have been one which was tied to the nondisclosure in question: Ethicon's failure to disclose Dr. Olcott's opinion regarding the negligence of Dr. Mungas. As noted above, the most that this nondisclosure

would justify is an order precluding Dr. Olcott from testifying about Dr. Mungas' negligence. Such a preclusion order—assuming the procedural requirements of Rule 37 had been followed—would have constituted a proper use of Rule 37 and hence would have been consistent with due process.[1]

III

THE UNSETTLED QUESTION ON WHICH THE CIRCUITS ARE SPLIT

The reason the Court should grant certiorari is because there is a split in the circuits on the dispositive issue in this case, *viz*: whether the finding that Ethicon acted in bad faith in failing to disclose Dr. Olcott's opinion about Dr. Mungas is sufficient to justify the entry of a default judgment. Prior to this Court's decision in *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976), it was well settled that the entry of a default judgment could not satisfy due process standards unless the conduct in question gave rise to a presumption that the offending party had no evidence to support its claim or defense. This remains the law in the Fifth and Ninth Circuits and in several states (see our Petition at pp. 21-23).

But in *National Hockey League*, this Court appeared to endorse the entry of a default judgment based *solely* on a finding that the defaulted party engaged in bad faith discovery abuse—without regard to whether the record supported a presumption that the party had no evidence to offer. This view has been followed by a majority of the circuits as well as a number of states (see our Petition at pp. 23-25). While the facts in most of these cases may well have supported a pre-

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[1] In fact, none of the procedural requirements of Rule 37 were met here. There was never (i) an order requiring Ethicon to provide the discovery in question nor (ii) a refusal by Ethicon to comply with such an order. Thus, under the express terms of Rule 37, the predicate for any preclusion sanction was totally absent.

sumption that the defaulted party had no evidence to offer, the cases were simply decided on the basis of bad faith, without regard to whether the presumption applied.

The decision below is a reflection of this unset tled law. Reviewing a record where the trial court had found "bad faith" discovery abuse by Ethicon, the Montana Supreme Court held that this finding was sufficient for due process purposes; it simply ignored the fact that the presumption mandated by *Hovey* and *Hammond Packing* does not exist. Until this Court clarifies the law in this area, there are going to be more and more instances of default judgments being entered as a punishment for discovery abuse and without any consideration of whether the defaulted party's conduct warrants the *Hammond Packing* presumption. As a result, those default judgments will have the effect of eviscerating a party's due process rights, as did the default judgment here.

We do not believe that this Court, in its *per curiam* decision in *National Hockey League*, intended to effect such a dramatic change in settled principles of due process. The Court should therefore use this case as a vehicle to rule that the understandable desire of the nation's trial courts to deal firmly with discovery abuse must be tempered by concern for the offending party's due process rights. Had the Montana courts given proper consideration to Ethicon's due process rights, they would have been required to craft a sanction which did not deprive Ethicon of its right to continue defending the case on the merits.

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